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# THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES: QUESTION OF HUMAN RIGHTS AND STATES OF EMERGENCY

## Tenth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37

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## Introduction

### Overview

1. Of the major changes that have occurred in this century, there is no doubt that one of the most transcendent and revolutionary has been the gradual shift in the area of human rights away from the leading role traditionally played by the State and towards a new vision focused more on human beings than on the authorities wielding power. At present, the latter's legitimacy essentially resides in the way they enable individuals and peoples effectively to enjoy their fundamental rights and freedoms.

2. From this point of view, the recognition of the international dimension of human rights and the emergence of the individual as a subject of international law constitute the two major conquests of this period and they introduce an ethical dimension into international legal relations. Nevertheless, at the very time these normative achievements came into effect, the world found itself in the grip of what amounted to an institutional epidemic of states of emergency, which, like a contagious disease infecting the democratic foundations of many societies, were spreading to countries in virtually all continents, particularly from the 1970s onwards.

3. As a result, in many cases states of emergency merely became the legal means of "legalizing" the worst abuses and the most pernicious forms of arbitrariness. Virtually none of the dictatorial regimes of the period resisted the temptation to justify their seizure of or maintenance in power, and the repressive measures they took. Behind the scenes of power, distinguished legal science experts came to act as loyal servants of the "Prince", clothing in legal apparel what was in fact nothing more than arbitrary rule.

4. Furthermore, this real proliferation of states of emergency was taking place against the background of ideological Cold War confrontation, which a great many Governments invoked to combat their own domestic dissidence. Very frequently, those who disagreed with a Government were described not as legitimate opponents but as domestic enemies, agents of the international enemy and therefore as factors of risk and insecurity for the nation. The most perverse version of this concept of the State and of the exercise of power was precisely the so-called "national security doctrine", which in some regions provided political and ideological grounds for the cruellest and most aberrant dictatorships of recent decades.

5. What emerges from these experiences is that in every case the proclamation of a state of emergency or the pure and simple application of measures of that kind was the legal instrument used by many dictators to suppress the human rights of most of the population and to crush any form of political opposition. In turn, the so-called "national security doctrine" and its variants (which was later condemned by the Commission on Human Rights as a doctrine contrary to human rights) served in practice as the ideological arsenal that sought to legitimize that type of behaviour.

6. Against this background it is easy to understand the huge significance of the study completed by Mrs. Nicole Questiaux in 1982, 1/ which determined

the conditions and requirements on which the legality of a state of emergency depended and which ensured that proper application thereof is compatible with respect for human rights and with democratic forms of government. At that time a real legal battle was taking place, imposed by those who denied the law and where the issue at stake was precisely the survival of one of the most prized principles of modern legal science, namely the rule of law.

7. Although the study did create a certain sense of awareness, there was still a series of obstacles to overcome along the arduous path towards providing protection for human rights during states of emergency. Here we shall draw attention to only two such obstacles, both of which are interpretative:

> The first, based on a restrictive interpretation of international monitoring, was the effort to restrict the application of human rights to normal or peaceful situations. It was the understanding of many Governments that at times of crisis, when national security or the stability of the regime, for example, were at risk, the authorities should consider themselves free of any form of control, whether domestic or international, and thus able to resort to any kind of means or instrument to resolve the crisis.
>
> The second obstacle was the fallacious and perverse argument that the country was experiencing internally a state of "dirty", unconventional war compelling the authorities to suspend the exercise of human rights and to claim, before international forums, that international humanitarian law conventions were not applicable since the situation did not involve an international armed conflict and even less a declared war. This gave rise to a kind of legal no-man's land where everything was permitted, including the cruellest and most aberrant forms of behaviour and the most serious human rights violations.

8. Fortunately, as this study demonstrates, in recent years the idea has become established that the state of emergency is an institution of the rule of law and that, as such, it must satisfy certain conditions and requirements ensuring legal guarantees to safeguard human rights in situations of crisis. In addition, as the work of both the Human Rights Committee and the regional monitoring bodies and the Special Rapporteur's experience have shown, international monitoring is not only active but has been reinforced precisely because situations are involved, as has already been demonstrated, human rights stand a greater risk of being violated and require greater protection. In the process, the task of international monitoring has become unquestionably accepted, thereby becoming more effective.

9. Furthermore, the case law of the monitoring bodies has lengthened the list of those rights whose exercise may not be suspended, by conferring non-derogable status on other rights that are not explicitly specified in the international legal instruments themselves.

10. Another noteworthy conquest has been the harmonization of the rules of international humanitarian law with the law of international human rights and recognition of the complementary nature of the protection they offer. In addition, other organs such as the specialized bodies of the International

Labour Organization (ILO) or general bodies such as the International Court of Justice in The Hague, have generated concurrent case law, constituting what amounts to an international standard of norms and principles governing emergency situations, which have provided the Special Rapporteur with a legal frame of reference.

11. However, this rapid overview would be incomplete if it failed to mention, albeit briefly, the disturbing scale of recent armed conflicts, the manner in which they are fought and their terrible impact on the human rights of the whole population. Ancient demons which we thought buried have re-emerged and have wrought mischief in settings as dramatic as the former Yugoslavia. The ethnic factor, in conjunction with other political, economic, historical and cultural factors, is eating away at the fragile political ties in Africa, with the harrowing consequences of confrontation - whose main victims are civilian populations - and a resurgence of the crime of genocide. In turn, poverty, especially in its most extreme form, combined occasionally with the impoverishment of the middle classes, has become one of the major causes of social and political tension, as is apparent in Albania and in some other countries. In recent times poverty has become far more conflictual than in previous decades, with an impact on other factors of conflict such as migratory pressure, the illegal drug trade and terrorism, which constitute the structural causes of new forms of violence. These phenomena frequently lead, in one way or another, to the declaration of a state of emergency or to its de facto implementation or give rise to major outbreaks of generalized violence. Clearly, the progress made in terms of protection for human rights and the regulation of states of emergency, and in the international monitoring thereof, is still not sufficient to tackle these new phenomena. In order to do so, there is a need, as a complement to existing controls, to address the structural causes of conflicts, to institute conflict-prevention machinery and to organize more efficient early-warning machinery.

## Background to the study

### 1. Inclusion of the topic on the agenda of the United Nations and appointment of a special rapporteur

12. In resolution 10 (XXX), dated 31 August 1977, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, deeply concerned by the frequency with which some countries applied the provisions relating to situations known as state of siege or emergency and by the manner in which they resorted to them, and convinced that a connection existed between such application and the situation regarding human rights in the said countries, requested the Economic and Social Council, through the Commission on Human Rights, to authorize a detailed analysis of the issue. Thus, for the first time, the United Nations decided to conduct a thorough study of the topic, 2/ and entrusted the Sub-Commission's expert, Mrs. Nicole Questiaux, with the preparation of the study. After several years' work, Mrs. Questiaux submitted a complete report to the Sub-Commission at its thirty-fifth session (E/CN.4/Sub.2/1982/15). The study was a decisive step towards understanding the problem and identifying its consequences for human rights as a whole and, among other recommendations, advocated permanent monitoring of the issue. Accordingly, in resolution 1983/30, the Sub-Commission decided to include in its agenda an item entitled "Implementation of the right of derogation

provided for under article 4 of the International Covenant on Civil and Political Rights and violations of human rights", which it subsequently decided to consider, as a matter of high priority, under the agenda item "The administration of justice and the human rights of detainees: (b) Question of human rights and states of emergency". 3/ In 1985, in resolution 1985/37, the Economic and Social Council endorsed the recommendation of the Commission and Sub-Commission to appoint a special rapporteur, Mr. Leandro Despouy, from among the Sub-Commission's experts, with the following mandate.

2. Special Rapporteur's mandate

13. Since 1985, the Special Rapporteur's original mandate - which led to 10 annual reports - has encompassed the following tasks:

To draw up and update annually a list of countries which since 1 January 1985 have proclaimed, extended or terminated a state of emergency;

To examine, in annual reports, questions of compliance by States with internal and international rules guaranteeing the legality of the introduction of a state of emergency;

To study the impact of the emergency measures adopted by Governments on human rights;

To recommend concrete measures with a view to guaranteeing respect for human rights in situations of state of siege or emergency.

14. On the basis of discussions within the Sub-Commission, and in response to express requests by the Commission, the Special Rapporteur:

Drew up guidelines to serve as norms for the development of legislation on states of emergency; 4/

Analysed in depth the question of the expansion of non-derogable core rights in conformity with current case law; 5/

Provided technical assistance to States that requested it (Paraguay, the Russian Federation, Colombia, etc.), as part of the technical assistance services of the Centre for Human Rights and other institutions.

15. The Special Rapporteur also responded to a number of requests for advisory services from various international organizations.

16. The Sub-Commission requested the Special Rapporteur, after 12 years of uninterrupted activity, in addition to updating the annual list, to submit his final conclusions on the protection of human rights during states of emergency. The aim, by updating the content of Mrs. Questiaux's report, is to collate developments in the international sphere in respect of this issue, on the basis of the activity of the international monitoring bodies, the experience gathered by the Special Rapporteur himself, the practice of States

and the treatment of the issue by the Commission and Sub-Commission. Lastly, the Sub-Commission requested the Special Rapporteur to submit specific recommendations on how this question should be addressed in future. 6/

3. Aim of this study

17. In conformity with the above mandate, this study has the following aims:

To review trends in international monitoring of crises;

To highlight the manner in which the various precedents established by the international monitoring bodies and the Special Rapporteur's own practice have served to consolidate certain guidelines and principles governing the state of emergency;

To point out the benefits of properly implementing the rules governing the state of emergency as well as, on the other hand, the harmful impact on human rights and peace of their incorrect application;

To provide the Sub-Commission and Commission with as comprehensive an overview as possible of the worldwide situation in respect of states of emergency, by analysing the list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency;

To make recommendations to enable States and United Nations agencies to deal with states of emergency better in future.

4. Sources of the information received

18. For the purpose of preparing both his annual reports and the present study, the Special Rapporteur was directed by the Sub-Commission to draw on all reliable sources of information. Details of the sources of information and of the methodology employed to draw up the annual list of States which have proclaimed, extended or terminated a state of emergency are provided in the introduction to the addendum to this document (E/CN.4/Sub.2/1997/19/Add.1). For the purposes of this study, the following sources of information were given priority:

The replies by States themselves to the requests made by the Special Rapporteur;

The findings and observations made by the Special Rapporteur in his previous reports;

The precedents established by the monitoring bodies with universal or regional competence, and in particular the United Nations Human Rights Committee, the European Commission and Court of Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights;

The specialized agencies of the United Nations, and in particular ILO and its Committee on Freedom of Association, as well as its Committee of Experts on the Application of Conventions and Recommendations, UNESCO, FAO and WHO;

The case law of the International Court of Justice;

The precedents established by other non-treaty bodies such as the Committee on the Human Rights of Parliamentarians of the Interparliamentary Union;

The competent non-governmental organizations which have contributed to the work of the Special Rapporteur from the beginning.

19. The Special Rapporteur would like to take this opportunity to express his thanks to all the above sources of information and in particular to the States which, in more than 200 communications, have made a continuing and decisive contribution to his work, thereby demonstrating the interest and importance of this topic.

## 5. Terminology

20. This study uses the expression "state of emergency" on account of its legal precision and current use in contemporary legal science. In addition, the expression encompasses the whole range of situations described by the terms "emergency situation", "state of siege", "state of urgency", "state of alert", "state of readiness", "state of internal war", "suspension of guarantees", "martial law", "crisis powers", "special powers", "curfew", etc. as well as all the measures adopted by Governments involving restrictions on the exercise of human rights beyond those properly authorized in normal circumstances.

## 6. Legal frame of reference

21. In view of the universal scope of his mandate, in his 12 years of unremitting activity the Special Rapporteur has been able to build up a legal frame of reference essentially based on the provisions of the international instruments governing states of emergency, and in particular article 4 of the International Covenant on Civil and Political Rights, and on the precedents established by its monitoring body, the Human Rights Committee.

22. As a result of the similarity between the provisions contained in article 4 of the Covenant and those set forth in articles 27 of the American Convention on Human Rights and 15 of the European Convention on Human Rights, 7/ the case law and precedents established by their respective monitoring bodies and those established by the Committee are in practice complementary.

23. To this legal frame of reference have also been added the precedents established by other international monitoring bodies which have expressed opinions on the matter and which as a rule confirm and occasionally complete

those of the above. These are, in particular, the precedents established by the United Nations Committee against Torture, the Committee on Freedom of Association of ILO and the International Court of Justice itself.

24. On this basis, the Special Rapporteur has developed what amounts to an international set of rules and principles applicable to states of emergency, 8/ which have formed the legal frame of reference both for his international monitoring activity and for his advice to States which have requested his assistance with a view to reforming their domestic legislation (Paraguay, the Russian Federation, Colombia, etc.)

25. On this same basis, and with the assistance of a team of specialists, the Special Rapporteur has drawn up a guide for the development of national norms.

26. The status and universal protection enjoyed by this body of norms and principles applicable in time of emergency derive essentially from the fact that they are the outcome of more than 12 years of monitoring activity, in which States, intergovernmental organizations and NGOs have taken part, and that they have incorporated the contribution of Sub-Commission experts and Commission members who, year after year, have added their comments when the annual reports have been considered. The Special Rapporteur has based himself on the principles set out by Mrs. Nicole Questiaux, to whom he wishes to pay tribute.

## I. DEVELOPMENT OF INTERNATIONAL PROTECTION FOR HUMAN RIGHTS UNDER STATES OF EMERGENCY

### A. From absolute State sovereignty to recognition of the individual as a subject of international law

27. In the light of the major changes that have occurred in the past 50 years in the sphere of human rights, it is a little surprising to recall that until very recently, and throughout virtually all mankind's history, the absolute power to determine which rights they allowed their subjects and to establish internal mechanisms for protecting them lay with sovereigns (monarchs, emperors, etc.) and later with States. It was only in this century, and more particularly after the Second World War, that human rights took on an international dimension as a result of the incorporation of their norms into a great variety of regional and universal treaties and conventions, thereby becoming one of the most dynamic and revolutionary branches of contemporary international public law. Thus, the eventual recognition of the individual as a subject of international law highlighted the major transformations that had taken place, in the sphere not only of international legal relations but also of international relations in general.

28. Nowadays, the concept of "non-interference in domestic affairs" has become blurred and lacks legitimacy when human dignity is at stake. The most conclusive proof of this assertion is the erga omnes nature of the obligations deriving from the human rights treaties and conventions. In other words, the norms they enshrine apply to all and possess, moreover, a dual dimension: the obligation to comply with the agreement and to object if others fail to do so.

This naturally implies a real commitment to fight for the universal application of human rights, which highlights the ethical dimension introduced by these instruments into contemporary international relations.

29. It is important to emphasize that human rights agreements do not regulate reciprocal relations among States, and that the centrepiece of protection is the human being; this has brought into being a form of "international public order", in which for the first time the main object of concern is the human person rather than States.

30. Thus, the conviction that a country's reputation depends not only on its economic or military might, but also on the manner in which its inhabitants are able fully to enjoy their human rights and fundamental freedoms has been steadily gaining ground among peoples and Governments.

B. Significant progress in international monitoring

31. Nevertheless, these decisive changes did not come about easily and had to make their way within an extremely hostile international setting marked by the cold war, and at a time when the so-called "national security doctrine" was becoming established in many developing countries and across virtually the whole of the American continent. As will be recalled, at the end of the 1970s, when the Human Rights Committee was beginning its work and the other regional monitoring bodies were stepping up their activities, the world was experiencing a real institutional epidemic of states of emergency. For example, more than two thirds of the countries in Latin America were in that situation.

32. This is why initially the progress made in the sphere of international monitoring failed to achieve with regard to crises the same levels of acceptance as in respect of normal situations. The main obstacle which had to be overcome was of a quasi-interpretative nature since, as international monitoring developed, some Governments argued even more forcefully that it was inapplicable, at least when a country was facing an emergency. 9/ Thus, if a crisis occurred, Governments alone were in a position to assess its seriousness and the suitability and scale of the measures required to resolve it. Against this background, it was argued that any form of external monitoring would be not only wrong but perhaps even harmful, as it would undermine the State's defence mechanisms.

33. Fortunately, the opposing view prevailed, as it would have been rather superfluous and even contradictory to promote human rights monitoring activities at international level in ordinary situations, while at the same time denying their applicability during times of crisis or instability, though aware that it is precisely in such situations that the worst violations of human rights and fundamental freedoms most frequently occur. In fact, quite on the contrary, as we shall see in this study, monitoring in times of crisis has not only become accepted but has gradually become more firmly established.

## C. Situations which justify the declaration of a state of emergency

34. Without placing undue emphasis on or excluding any particular situation, this study covers all emergency situations resulting from a serious crisis of the sort which affects the population as a whole and which jeopardizes the very existence of the community organized on the basis of the State. In essence, as we shall see below, this interpretation comes closest to the concept of "public emergency" employed in articles 4 of the International Covenant on Civil and Political Rights and 15 of the European Convention on Human Rights respectively and of "public danger" employed in article 27 of the American Convention on Human Rights, which constitutes a sine qua non or prerequisite for a state of emergency to be declared. Thus, both international war and internal armed conflicts, just as states of tension or domestic disturbances caused by political, economic, social or cultural factors, when accompanied by clashes, acts of violence, vandalism, inter-ethnic confrontations, terrorist attacks, etc. and provided they represent an actual or at any rate imminent threat to the community as a whole, constitute a "public danger" or "public emergency" in the meaning conferred on those terms by the international instruments referred to above.

35. This interpretation conforms to the preparatory discussions which took place concerning Article 4 of the International Covenant on Civil and Political Rights, and which excluded neither natural disasters (such as earthquakes, cyclones, etc.) nor environmental catastrophes from among the causes of a public emergency provided they were on such a scale as to jeopardize the community. Lastly, it is worth pointing out that the fact that the International Covenant on Civil and Political Rights, in contrast to articles 15 of the European Convention and 27 of the American Convention, explicitly does not include war among the possible causes of a state of emergency does not mean that it excludes it. This is demonstrated by the fact that until 1952, in the preparatory work for article 4 of the Covenant, the original version covered states of war, although the latter reference was abandoned in favour of the generic formula "public emergency" to avoid giving the impression that the United Nations authorized, or at least accepted, war.

## D. Grounds invoked for declaring a state of emergency

36. As the declaration of a state of emergency is a legal act, it must be justified, that is, it must contain, inter alia, a clear statement of the grounds on which it is declared. It is well known that international law does not specify on what grounds the declaration of a state of emergency is authorized but limits itself to emphasizing that the crisis arising from those grounds must be of an exceptional nature. This explains why the arguments put forward by Governments in their communications to the Special Rapporteur are highly dissimilar and occasionally somewhat generic, although they invariably invoke a threat to the State, to institutions and/or to the population. This is illustrated by the following examples given: a threat to State security, to public order, to the Constitution and to democratic institutions; acts of violence, subversion or terrorism; vandalism; a threatened or real external attack; internal mutinies or rebellions; attempted coups d'état; the assassination of members of the Government, etc. Frequently, the need to deal with public calamities, and with man-made or natural disasters (such as

earthquakes, cyclones, etc.) is invoked. There is also a growing tendency to invoke ethnic issues and/or internal disturbances caused by social tensions due to economic factors linked to poverty, impoverishment or the loss of social benefits by significant sectors of the population.

## E. Norms applicable to states of emergency

37. There are essentially two branches of international public law whose purpose is to provide a legal framework for limiting and regulating crises: international human rights law and international humanitarian law. The former is intended to regulate the norms which apply when a crisis is serious enough to constitute a real threat to the community as a whole, while the latter applies when two States are in conflict or when a people is struggling to exercise its right to self-determination (international war) or when the degree of internal strife is so intense that the crisis amounts to an internal armed conflict.

38. Briefly, from the standpoint of international humanitarian law (which is precisely intended to apply in public emergencies), it is possible to distinguish between at least three types of situation:

International war (whether a war between States or a war of national liberation), in which case most of its norms apply, in particular those contained in the two Conventions of The Hague of 1899 and 1907 and the four Geneva Conventions of 1949 and their Additional Protocol I;

A "highly intense" internal armed conflict (where it may be assumed that the insurgents are fairly well organized and control part of the territory), in which case the norms contained in Additional Protocol II to the four Geneva Conventions of 1949 apply; and lastly

A "relatively intense" internal armed conflict (where it is assumed that the intensity of hostilities and the level of organization of the combatants is below that required by the above Protocol), in which case the provisions set forth in article 3 common to the four Geneva Conventions apply.

39. For purposes of the application of international human rights law, the concept of "public emergency" or of "public danger" contained in the International Covenant on Civil and Political Rights and in the other international instruments encompasses both armed conflicts (internal and international) and states of internal tension or disturbance, which may involve acts of violence or confrontation justifying the introduction of a state of emergency, without the intensity of the hostilities being sufficient for the crisis to be classed as an "armed conflict", under the terms of Protocol I additional to the four Geneva Conventions and article 3 common to those Conventions.

## F. Complementarity among the norms governing crises

40. Clearly, what distinguishes human rights and international humanitarian law is not their common vocation to safeguard or protect, but the opposing paths they have taken in the course of their development. Initially, human

rights were exclusively entitled to internal protection, gradually developing until, in the second half of this century, they acquired an international dimension. In contrast, international humanitarian law came into being in order to regulate international armed conflicts, gradually narrowing its focus and entering the national sphere to cover internal armed conflicts. 10/

41. Thus, in normal peacetime, the unrestricted exercise of human rights is the rule. If, on the contrary, it is necessary to deal with a crisis which does not amount to an armed conflict but which does constitute a "public emergency" posing a serious threat to the community as a whole, then a state of emergency may be declared. However, if the crisis develops into an internal or international conflict, then the protective norms of international humanitarian law will begin to apply harmoniously and complementarily alongside internal and international norms protecting human rights under states of emergency.

## G. Grounds for states of emergency

42. In practice, all legal systems in the world provide for the possibility of adopting special measures to deal with crises. This is why both the domestic law of States (whatever its theoretical foundations) and international law accept that in such circumstances the competent authorities may suspend the exercise of certain rights for the sole and unique purpose of restoring normality and guaranteeing the exercise of the most fundamental human rights. This might seem paradoxical, and indeed to some extent is so, since it entails the possibility of legally suspending the exercise of certain rights as the only means of guaranteeing the effective enjoyment of the most fundamental ones. Thus, for example, it is understandable and even reasonable that at the scene of a battle or of a major disaster, such as an earthquake, freedom of movement may be temporarily suspended in order to safeguard the right to life, which is clearly at risk and threatened in both circumstances.

43. As we shall see below, this rationale is the backbone of the state of emergency as regulated by contemporary international law and determines its essentially protective rather than repressive nature. In the domestic law of States, this ground is generally linked to the defence of the Constitution or the fundamental institutions of the State, etc., which bear responsibility for ensuring the freedom and security of all citizens. 11/ In this respect, the concept of the legitimate defence "of essential State institutions" or "of the Constitution, momentarily threatened by a domestic disturbance or external attack" which "threatens the exercise of the Constitution or of the human rights of the population", etc., is a fairly common formula in most of the constitutions developed during the last two centuries.

44. The protective nature of the most fundamental human rights and the defence of institutions which safeguard them and which justify the temporary suspension of certain rights and freedoms explain why international monitoring bodies with increasing precision and clarity have been tying the exercise of this exceptional measure to the defence of democracy, which is understood not only as a particular form of political organization that it is unlawful to attack but as a system that "lays down absolute limits for the unfailing observance of certain essential human rights".

### H. Juridical nature

45. In the light of the above, it is essential to place the state of emergency firmly within the field of law and thus to dispel any mistaken interpretations linking it with discretionary power to exercise authority during crises. On the contrary, as a legal institution not only is its introduction conditioned by the existence of a serious emergency affecting the population as a whole, but it must also satisfy certain specific requirements, such as for example, the official declaration of the state of emergency, the proportional nature of the measures adopted, etc., all of which determine its legality. In addition to setting concrete limits to the exercise of extraordinary powers or the so-called "crisis powers", these requirements in fact serve in practice as explicit or implicit legal guarantees to ensure the observance of human rights under such circumstances.

46. In historical terms, the first and perhaps most important guarantee consists in predetermining the rules of the game, in other words in "foreseeing the unforeseeable". This has been and undoubtedly still is one of the hardest tasks faced by legislators, who must determine in advance the rules that will both justify and limit the powers needed to deal with a crisis.

47. To put it briefly, the pre-existence of norms that the rule of law itself provides (and to some extent holds in reserve during normal periods) already gives us a definition of the legal nature of states of emergency. It follows that regardless of any political or other significance ascribed to the institution, the very fact that it is an extreme legal remedy means that it cannot lie outside the rules and principles of law.

48. In this respect the Inter-American Court of Human Rights has clearly established, in Advisory Opinion OC-8/87, that while the suspension of guarantees constitutes an emergency situation, this does not mean that it "implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times". It also observed that "there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law". 12/

## II. NORMS AND PRINCIPLES GOVERNING STATES OF EMERGENCY

49. This chapter sets out in detail in the form of statements or principles all the conditions which must be fulfilled by states of emergency for them to comply with international norms and which make up the legal frame of reference of the Special Rapporteur's supervisory work.

### A. Principle of legality

50. This requirement, which is inseparable from the nature of the state of emergency as an institutional part of the rule of law, implies:

the necessary pre-existence of norms which govern it;

the existence of both internal and international monitoring mechanisms which verify its conformity with these norms.

51. Although initially this principle was valid only internally, nowadays its scope has become universal owing to the large number of States which have ratified the International Covenant on Civil and Political Rights and the American and European Conventions on Human Rights, and the fact that the Special Rapporteur's mandate covers all States Members of the United Nations, including those which are not parties to these instruments.

52. In order to ensure proper regulation of this principle, the Special Rapporteur proposes the following model norm:

A state of emergency may be declared or extended only in accordance with the Constitution or Fundamental Law and the obligations imposed by international law in that respect. States shall therefore bring their domestic legislation into line with international norms and principles governing the legality of the state of emergency. In order to avoid circumstantial legislative reforms, regulations governing the state of emergency shall enjoy constitutional status and shall govern all emergency situations (of whatever description) liable to lead to any kind of limitation of the exercise of human rights.

B. Principle of proclamation

53. This is a formal requirement, consisting of the need for the entry into force of the state of emergency to be preceded by a public announcement in the form of an official declaration. This is intrinsic to the republican (res publica) form of government and contributes to averting de facto states of emergency.

54. The purpose of proclamation is to ensure that the population affected is precisely informed of the material, territorial and temporal scope of the emergency measures and their impact on the enjoyment of human rights. It is in fact unthinkable that the existence of a crisis situation should be concealed from the population, far less the existence of restrictions on their rights.

55. On the other hand, the proclamation of the state of emergency, as a legal prerequisite to putting it into practice, is not only indispensable to ensure its validity but also draws attention to the national authority competent to take the decision.

56. Although article 4 of the Covenant is the only provision which expressly requires official proclamation the regional monitoring bodies have also interpreted it as a requirement. For example, the European Commission, in the case of Cyprus v. Turkey 13/ considered that, in order to be able to invoke the right of derogation governed by article 15 of the European Convention, the derogating State must be able to justify the existence of an official proclamation. The Human Rights Committee for its part has since the very beginning drawn the attention of Governments on numerous occasions to their

failure to comply with this requirement. For example, on the occasion of the consideration of the first periodic report of Suriname, the country representative admitted to the experts of the Committee that although a de facto state of emergency had existed during the coup d'état of 1980, neither a state of emergency nor a state of siege had been officially proclaimed. 14/ As may be seen from the annual list, the Special Rapporteur has made numerous comments of this nature, and has included in the category of countries under a de facto state of emergency those which introduced emergency measures without complying with the formal requirement of an official proclamation. For example, his comments coincided with those of the Human Rights Committee in the cases of Togo, Lebanon, Namibia and South Africa, prior to the institutional changes which took place in those countries.

57. In order to ensure that this principle is properly regulated, the Special Rapporteur proposes the following model norm:

> The legislation shall provide that the proclamation of the state of emergency shall be null and void unless it is ratified either by the national legislature or by another competent constitutional body within a brief deadline established by law. Guarantees shall also be provided by law that monitoring bodies will be able to function during situations of crisis.

58. It is particularly important to understand the complementary link between this principle and the principle of legality, since the reference to an "officially proclaimed" situation of emergency in article 4 of the International Covenant on Civil and Political Rights - which was a French initiative - is also intended to ensure that the recognition of the right to suspend obligations arising under the Covenant cannot be invoked to justify a violation of the internal legal provisions of the Constitution concerning states of emergency. 15/

### C. Principle of notification

59. Unlike proclamation, which as a publicity measure is basically intended to inform the national community, notification is aimed specifically at the international community. It is addressed to:

> other States, in the case of a convention;
>
> States Members of the United Nations, in the case of the work of the Special Rapporteur.

60. The essential objective of this formality is to put into effect the obligation of every State party to a convention to communicate to the other States parties that it is temporarily unable to comply with certain obligations set out in the convention. In other words, the rule is that the obligations assumed must be met - in this case, unrestricted observance of all the rights recognized in the instrument - and should it be temporarily impossible to do so, the other States must be informed through the depositary of the Treaty - who is the Secretary-General of the United Nations for the

International Covenant on Civil and Political Rights, and in the case of the two regional conventions, the Secretary-General of the Organization of American States and the Secretary-General of the Council of Europe, respectively.

61. The communication must be immediate and must expressly mention which provisions are being suspended and the reasons for the suspension. Similarly, States are required to give notice by the same means of the lifting of the state of emergency.

62. Although notification is a formal requirement, it plays an extremely important role as a prerequisite, which entitles States once they have complied to avail themselves of the derogation clauses which international law exceptionally and provisionally accepts. Thus, if a country has declared a state of emergency, even if it has done so in conformity with national norms, it may not, unless it has issued a formal notification, invoke internationally the right recognized by the international order to suspend certain guarantees in emergency circumstances.

63. This criterion has been clearly established by the Human Rights Committee on numerous occasions. For example, in considering the additional report submitted in 1980 by Colombia, which had not given notification of the state of siege declared in 1976, the experts requested an explanation and reminded the Government that the right of derogation could not be invoked vis-à-vis the international order if the State party which invoked it had not complied with its obligation to communicate to the other States parties the provisions from which it had derogated and the scope of and need for such derogation. Similarly, with regard to Egypt, the Committee regretted that this country "had not informed the other States parties to the Convention, through the Secretary-General, of the provisions from which it had derogated and the reasons by which it was actuated, as specifically required by article 4, paragraph 3 of the Covenant." 16/ Somewhat along the same lines, the Committee made similar comments concerning the failure to comply with this requirement by the authorities of Cameroon (with reference to the proclamation of a state of emergency at the time of the events that took place in the country's Nord-Ouest province in 1992) and Togo (with reference to the curfews established during the transitional period in April and November 1991). 17/

64. Outside the context of treaties but within the United Nations system, various resolutions establish the obligation of States to inform the Special Rapporteur of the declaration, extension or lifting of a state of emergency. The Rapporteur's mandate authorizes him to question States if they do not comply, thus establishing an adversary procedure which may develop into a public debate, within the framework of the Sub-Commission or Commission on Human Rights.

65. The Special Rapporteur has adopted the practice of sending a note verbale to all States, requesting the fullest possible information regarding the existence or otherwise of a state of emergency in any of its forms or variants, and if it does exist, (a) applicable legislation, indicating the provisions of the Constitution on which the declaration is

based and any other legal information or relevant facts which enable its legality to be evaluated, and (b) the scope of the measures and their impact on the exercise of human rights.

66. Governments have, generally speaking, responded positively to such requests. Where the Special Rapporteur has learned through the press or a non-governmental organization of the existence of a state of emergency, he has contacted the authorities of the country concerned, indicating his sources and requesting clarification and detailed information. Normally, this procedure has been fairly rapid, although in some cases it has involved an intensive exchange of correspondence. The publication of the annual list and its handling by the Sub-Commission and Commission on Human Rights gives Governments the opportunity to contribute further clarifications concerning the accuracy of the information it contains.

67. Thus, for example, when the Special Rapporteur, acting on information from non-governmental sources, included in the annual list a country which later demonstrated the inaccuracy of the information, the country in question - the Republic of Korea - was struck off the list. 18/ It should nevertheless be pointed out that in all other cases in which the source of information was not the Governments themselves, the latter explicitly, or at least tacitly, confirmed the information given in the list since it is handled publicly.

68. In order to ensure that this principle is appropriately regulated, the Special Rapporteur proposes the following norms as a model:

The act of proclamation of the state of emergency shall set out:

(i) the circumstances motivating it (i.e. the "emergency situation" which justifies it);

(ii) the territory to which it applies;

(iii) the period for which it is introduced;

(iv) the measures it authorizes;

(v) the provisions of the Constitution or Fundamental Law and national legislation and the obligations stemming from international law which are affected by these measures.

National legislation itself shall provide that all relevant international bodies be immediately notified of the declaration containing the above information.

## D. Principle of time limitation

69. The statement of this principle, which is inherent by nature in the state of emergency, is basically intended to indicate that the latter is necessarily limited in time and thus to prevent it being unduly perpetuated. Article 27 of the American Convention on Human Rights expressly states that the measures adopted are "for the period of time strictly required by the exigencies of the situation."

70. Already an established feature of European case law (the Lawless case, for example), the time limitation principle is quite explicit in the precedents of other international supervisory bodies. For example, the Ad Hoc Working Group on the Situation of Human Rights in Chile (established within the Commission on Human Rights to consider the situation of human rights in Chile during the Pinochet regime) pointed out on several occasions 19/ that although the state of siege had been lifted in Chile, the Government continued - with no objective justification - to apply measures reserved for public emergencies in order to maintain the state of emergency. Echoing the same arguments, the Human Rights Committee, in considering the first report submitted by Chile under article 40 of the Covenant, deemed inadequate the information furnished by the Government insofar as it did not specify the effects of the state of emergency on all the rights set out in the Covenant. It was also argued, as a basis for requesting an additional report, that the restrictions accepted by the Covenant were inherently limited in time and space, while in Chile they had become institutionalized throughout the country for an indeterminate period. 20/

71. In order to stress the temporary nature of the state of emergency, the Human Rights Committee stated its understanding, in its General Comment 5 on article 4 of the Covenant, that the obligation to inform the other States parties immediately of the rights suspended included the reasons therefor and the date on which the suspension would end.

72. It is interesting to note that, even before the entry into force of the American Convention on Human Rights, the Inter-American Commission on Human Rights had already, on the basis of the norms contained in the 1948 American Declaration on the Rights and Duties of Man, reaffirmed the principle of time limitation on various occasions, denouncing the "routine" character of the application of the state of emergency in countries such as Haiti (special report of 1979) and Paraguay (*in situ* visit in 1965 and special report of 1978), and had recommended the lifting of the state of emergency in Uruguay (annual report of 1980) and Argentina (special report of 1980). In the last-mentioned case, the Government was requested to consider the possibility of terminating the state of siege in view of the fact that, according to the repeated statements of the Government of Argentina, the causes that had given rise to it no longer existed.

73. The Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union pointed out in 1978 that it followed from article 4 of the International Covenant on Civil and Political Rights, ratified by Kenya on 1 May 1972, that the derogation measures authorized thereby could only be of an exceptional and temporary nature. 21/

74. In order to guarantee the proper regulation of this principle, the Special Rapporteur proposes the following norm as a model:

National legislation shall indicate that:

No state of emergency may remain in force for longer than is strictly necessary;

The competent authorities shall immediately terminate the state of emergency if the circumstances that justified its proclamation cease to exist or if the threat upon which it was based assumes such proportions that the restrictions permitted by the Constitution and laws under normal circumstances are sufficient for a return to normality.

75. In order to avoid the wrongful application and the perpetuation of the state of emergency, another model norm would propose:

The periodic review (at intervals that should not exceed three months), by the monitoring body or bodies, of the reasons justifying its maintenance or extension.

## E. Principle of exceptional threat

76. This principle defines the nature of the danger and refers to the de facto premises (internal disturbances, external attack, public danger, natural or man-made disastors, etc.) which make up the concept of "exceptional circumstances".

77. Since this is a principle that has become established in many judicial rulings, it will be reviewed only briefly. Here the European precedents are extremely clear. Both in the Lawless case and in the case of Greece 22/, it was considered that the danger should be current or at least imminent, which invalidates any restriction adopted for purely opportunistic, speculative or abstract purposes. This last point was also made by the Human Rights Committee while considering the report of Chile, when it maintained most insistently that arguments such as those of "national security" or "latent subversion" did not justify any derogation from the obligations set forth in the Covenant.

78. As regards its effects, the dangerous situation must affect:

The entire population: Lawless case, 23/ for example;

The entire territory or a part thereof: for example, with regard to the measures of derogation adopted by the Government of the United Kingdom and Northern Ireland, the European Commission of Human Rights and the European Court of Human Rights, as well as the Human Rights Committee, held that a geographically limited emergency could affect the population as a whole and constitute a threat to the life of the nation.

79. The European Commission of Human Rights, in the case of Greece, 24/ stated that, in order to constitute a threat to the nation, a situation of public emergency had to fulfil at least the following four conditions:

It must be current or imminent;

Its effects must involve the whole nation;

The continuity of the organized life of the community must be threatened; and

The crisis or danger must be exceptional, in the sense that the ordinary measures or restrictions permitted by the Convention for the maintenance of public security, health or public order are clearly inadequate. This refers to the so-called "restriction clauses", that is, those that authorize the restriction of some rights in ordinary situations when that is necessary in order to guarantee public safety, health or public order. 25/

80. It should be pointed out that as long ago as the Cyprus case 26/ the Commission declared itself competent to rule as to the existence of a "public emergency". In the Lawless case, the Court specified the components of this concept. In the case of Greece, the Commission followed the same criterion and held that the burden of proof rested with the respondent Government. On the substance of the question, it concluded that objective analysis of the information supplied by the Government of Greece and other data in the hands of the Commission (concerning the events of 27 April 1967, known worldwide as the "coup d'état of the Colonels") showed that there was not at that time a public emergency in accordance with the terms of article 15 of the European Convention on Human Rights, on account of which it held that the restrictions imposed on that ground ("public emergency") were contrary to the Convention. The European Court was adopting the same criterion at the time when Greece, faced with imminent expulsion, withdrew from the Council of Europe.

81. Lastly, even when an emergency located in part of the territory of a country may constitute a threat to the population as a whole, the state of emergency should be applied in a limited manner to the territorial area where order is disrupted and the scope and validity of the measures should obtain solely in that area. That was the criterion established by the Special Rapporteur in the exchange of notes verbales with the Government of Paraguay during the Stroessner regime in respect of the blatant illegality of the arrests ordered by the executive power inside Paraguay, when in reality the state of siege was in force only in the city of Asunción: the practice was then to transfer the prisoners immediately to the capital, where they remained under arrest for extremely long periods.

82. In order to ensure proper regulation of this principle, the Special Rapporteur proposes the following model norm:

The legislation shall stipulate that the competent authority may declare a state of emergency only in the following cases:

(i) In the event of severe disturbances that endanger the vital interests of the population and constitute a threat to the organized life of the community, in the face of which the restrictive measures permitted by the Constitution and laws in ordinary circumstances are clearly inadequate; or

(ii) In the event of a real or imminent danger of such disturbances;

(iii) Solely in order to safeguard the rights and safety of the population and the operation of public institutions under the rule of law.

## F. Principle of proportionality

83. This requirement is directed at the need to ensure that the measures adopted are consonant with the severity of the crisis. It is stated in a similar way in the International Covenant on Civil and Political Rights and in the European and American Conventions on Human Rights and implies that any restrictions or suspensions should be imposed "to the extent strictly required by the exigencies of the situation".

84. This principle, like its justification - legitimate defence - presupposes the existence of an imminent threat and requires a proportional relationship between that threat and the measures used to avert it. These measures in turn, if they are to be legitimate, must be proportional to the severity of the threat. Thus any excess in the use of the measures makes the "defence" illegitimate and thus transforms it into aggression.

85. Even prior to the entry into force of the International Covenant on Civil and Political Rights, the validity of the principle of proportionality in international law had been demonstrated by, inter alia, the special commission set up within ILO on the occasion of the suspension of the application of Conventions 87 and 98 by the de facto Government which seized power in Greece on 27 April 1967. 27/ It is important to analyse the grounds on which the commission declared itself competent, for it held that all legal systems in one way or another accept that it is the judiciary that is responsible for assessing arguments claiming the ground of legitimate defence. For that reason, if the validation of the state of emergency has to be treated in international law as a legal concept, it is important that its assessment should rest with an impartial authority at the international level. 28/

86. With regard to the law that is applicable 29/, the commission held that the general principle that emerges, both from national practice and from international custom, is based on the presumption that the non-fulfilment of a legal obligation is not justified, except to the extent that it may be demonstrated that it is impossible to proceed othewise than in a manner contrary to the law. Lastly, it was pointed out that the action that was claimed to be justified should be limited, both in scope and in duration, to what is immediately necessary. This precedent proves the universal scope of the principle of proportionality even prior to the entry into force of the International Covenant on Civil and Political Rights.

87. In surprising contrast, in the European context the principle of proportionality seems much vaguer. As was stated in one case, the measures taken should at least appear to allow the mitigation or elimination of the specific emergency situation, although, with respect to the Convention, their justification does not depend on knowing whether they will effectively attain their objective ... . The principle of proportionality should be regarded as being respected if the apparently excessive rigour of the measures taken - principally if they concern the suspension of ordinary guarantees - is offset by the introduction of extrajudicial replacement guarantees. 30/ The Special

Rapporteur considers the equity of this precedent to be very questionable since the practice of States - as it emerges from their reports - reveals the ineffectiveness of the so-called "replacement guarantees", particularly that of mandatorily appointing an official defence counsel where prisoners are not allowed appoint their own.

88. On the other hand, the Human Rights Committee has reaffirmed the principle of proportionality on numerous occasions, whether during the consideration of the general reports referred to in article 40 of the Covenant, or as a result of the comments made under the provisions of article 5.4 of the Optional Protocol to the Covenant. In the former case the Committee has established, as a criterion of general guidance, that the principle of proportionality should not be analysed in the abstract (consideration of the report of Chile) or on a general basis, but in respect of each individual derogation (consideration of the report submitted by the United Kingdom of Great Britain and Northern Ireland). In the latter case, the Committee established a significant precedent in 1975 when dealing with a complaint by five Uruguayan citizens deprived of all their political rights by a Government decree, which placed a 15-year ban on all persons who had presented themselves as candidates in the national elections of 1966 and 1971. The Committee held that the Uruguayan Government had not been able to demonstrate that the silencing of all political dissidents was necessary to resolve a presumed emergency situation and to open the way to political freedom. In other words, the monitoring body not only regarded the alleged emergency situation as merely presumed, but it considered the principle of proportionality to have been infringed, and to some extent distorted, when it rejected the argument whereby the Uruguayan authorities claimed to demonstrate that the purpose of the destruction of political rights was to re-establish political freedoms and the rule of law.

89. Both the Inter-American Commission and the Inter-American Court have advocated compliance with the principle of proportionality. The former did so in making observations in various annual or special reports on countries: for example, in the annual reports of 1978 and 1980 on the human rights situation in El Salvador and in the special report on Argentina of 1980, in particular its reply to that Government concerning the consideration of case 3390. The Inter-American Court, in its Advisory Opinion OC-8/87, stated that the lawfulness of the measures taken to deal with the various special situations that may arise will depend upon the character, intensity, pervasiveness and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures.

90. In view of its importance for the safeguarding of human rights, the correct application of the principle of proportionality, like that of the other principles, presupposes periodic review by the competent national organs, in particular the legislature and the executive.

91. In order to guarantee the proper regulation of this principle, the Special Rapporteur proposes the following, inter alia, as model norms:

During the state of emergency, the restrictions imposed upon the exercise of human rights shall be imposed only to the extent strictly required by the exigencies of the situation, taking into account the other exigencies established in the internal and international order.

When a state of emergency affects the exercise of certain derogable human rights, administrative or judicial measures shall be adopted to the extent possible with the aim of mitigating or repairing the adverse consequences this entails for the enjoyment of the said rights.

## G. Principle of non-discrimination

92. Article 27 of the American Convention on Human Rights, like article 4 of the International Covenant on Civil and Political Rights, requires that the restrictions imposed shall not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Obviously the word "solely" has the effect of accentuating the discriminatory motive of the measures. Article 15 of the European Convention omits this requirement, but should be interpreted in conjunction with article 14, which has a general scope and prohibits any type of discrimination in the exercise of any right recognized in the Convention.

93. The Special Rapporteur has taken the view 31/ that the fact that the prohibition of any form of discrimination is not included among the rights set forth in article 4(2) of the Covenant and in article 27(2) of the American Convention does not constitute an obstacle to regarding it as implicitly non-derogable, since both texts consider the principle of non-discrimination as an essential condition for exercising the right of derogation which those instruments accord to States parties. Coincidentally, in its general comment 5/13 the Human Rights Committee places the principle of non-discrimination on the same level and even includes it in the same sentence as non-derogable rights when it states: "The State party, however, may not derogate from certain specific rights and may not take discriminatory measures on a number of grounds". 32/

94. In order to ensure proper regulation of this principle, the Special Rapporteur proposes the following model norm:

> The legislation shall stipulate explicitly that the principle of non-discrimination is not subject to any type of limitation or derogation.

## H. Principles of compatibility, concordance and complementarity of the various norms of international law

95. The effect of these three principles is to harmonize the various obligations undertaken by the States in the international order and to strengthen the protection of human rights in crisis situations through the concordant and complementary application of all the established norms in order to safeguard those rights during a state of emergency.

96. With regard to the first principle, the Covenant and the two regional conventions already referred to all stipulate that States may, under the aforementioned conditions, derogate from the obligations undertaken under those instruments, "provided that such measures are not inconsistent with their other obligations under international law". The purpose of this principle is to ensure that the different international norms regulating the matter are compatible, since any given State may be party to several international and regional conventions. For example, a country that is a party to the American Convention and to the Covenant could not, on the basis of this principle, invoke before the Inter-American Commission the derogation of a right that is accepted in the Covenant but denied in the American Convention. As Dr. Manfred Novak points out, 33/ the expression "other obligations under international law" covers both international customary law and the law contained in international treaties, in the first place in the various human rights and international humanitarian law conventions.

97. Implicit in this requirement of compatibility is the precedence of norms most favourable to the protection of human rights. In turn, these norms are not mutually exclusive but complement and reinforce each other. Where this appears most clearly is in severe crisis situations involving relatively serious armed conflicts, where the international law on human rights and international humanitarian law are applied in a simultaneous and complementary manner.

98. The principle of concordance between the purpose of the derogation and the rights recognized in the international order is clearly established in article 5(1) of the International Covenant on Civil and Political Rights, which stipulates that the restrictions imposed must not be "aimed at the destruction of any of the rights" recognized in the international order.

99. Accordingly, the Special Rapporteur repeatedly took the opportunity to point out the illegal character of the emergency measures adopted by the racist Government of South Africa, whenever they were aimed at perpetuating the apartheid regime and involved a denial of the right to racial equality, as set forth in the Universal Declaration of Human Rights and in many other instruments. The same criterion ought to apply to any colonial government that introduces emergency measures in order to perpetuate the situation of colonial domination, since those measures would be aimed at destroying the right of self-determination set forth in article 1 of both international covenants.

100. This criterion also applies in the event that the suspension of constitutional guarantees is announced by a government resulting from a coup d'état, with the aim of making itself secure and/or maintaining itself in power. Here it is important to point out that the Inter-American Court has held that the suspension of guarantees cannot be dissociated from "the effective exercise of representative democracy" referred to in article 3 of the Charter of the Organization of American States. Likewise, the Court has had occasion to rule on article 29 (c) of the American Convention on Human Rights, which stipulates that the restrictions provided for in that Convention cannot be interpreted as "precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government", while stating forcefully that the guarantees that are

derived from this article imply not only a specific political system against which it is unlawful to take action but the need for this system to be protected by judicial guarantees that are essential for determining the lawfulness of the measures taken in emergency situations, so as to preserve the rule of law.

101. In short, according to the criteria laid down by the Inter-American Court, the sole valid justification for states of emergency is the defence of the democratic system, which is understood as a system that affords absolute protection to the constant maintenance of certain essential rights of the human person. Thus the rule of law constitutes the legal framework for the regulation of states of emergency. The sole justification is defence of the democratic order, which in turn is defined not as a political system but as a set of values that is based on human rights as a whole. The rule of law, democracy and human rights form a single entity that the emergency cannot break, either exceptionally or temporarily.

## III. NON-DEROGABILITY OF THE EXERCISE OF FUNDAMENTAL HUMAN RIGHTS

102. Although this is undoubtedly one of the most important principles governing the lawfulness of the state of emergency, since it lays down absolute limits on the exercise of the powers assumed in a crisis, we have preferred to deal with it separately from the previous chapter solely in order to draw attention to a number of significant aspects of its rich history.

### A. International norms setting forth non-derogability

103. The International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights specify clearly which fundamental human rights may not be suspended or restricted. 34/ In some cases, non-derogability covers rights common to all three instruments, such as the right to life, the prohibition of torture and slavery and the non-retroactive nature of criminal law. The European Convention limits its selection to these rights, while the International Covenant on Civil and Political Rights and the American Convention extend non-derogabilty to the right to recognition as a person before the law and to freedom of conscience and religion. Singularly, the International Covenant on Civil and Political Rights prohibits imprisonment on the ground of inability to fulfil a contractual obligation (art. 11). In turn, the American Convention, which provides by far the most generous protection, extends non-derogability to protection of the family (art. 17), to the rights of the child (art. 19), to nationality (art. 20) and to political rights (art. 23), as well as to the legal guarantees essential to protect those rights. Nevertheless, this non-derogabilty which is extended by international law to the exercise of certain rights has been strengthened by various factors.

### B. Impossibility of making reservations to certain rights

104. When the Human Rights Committee considered France's report in 1983, an extremely instructive debate took place on the validity of the reservations made by France to article 4 (1) of the International Covenant on Civil and Political Rights. 35/ The expert from the German Democratic Republic asserted that France had confirmed that reservations to article 4 were permissible, in

response to which the representative of France said that the reservations were limited to paragraph 1 of that article. In actual fact, the only State to have made reservations to article 4, paragraph 2 of the Covenant is Trinidad and Tobago, although the Governments of the Federal Republic of Germany and of the Netherlands considered those reservations incompatible with the aims and purposes of the Covenant and formally opposed them. Those discussions lead us to the conclusion that although the Committee could accept reservations to article 4 (1), under article 19 of the Vienna Convention on the Law of Treaties reservations to paragraph 2 are incompatible with the aims and purposes of the Covenant. Some of the conclusions reached by the Inter-American Court of Human Rights in its Advisory Opinion OC-3/83 on restrictions to the death penalty are also relevant.

### C. Enhancement of non-derogability as a result of the entry into force of other human rights agreements

105. The non-derogability of the exercise of certain rights, set forth in article 4, paragraph 2 of the International Covenant on Civil and Political Rights, has been enhanced or expanded as a result of the entry into force of other international instruments. This was the case with the entry into force of the American Convention on Human Rights. Similarly, article 2, paragraph 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment underpinned the non-derogable nature of the right to physical, mental and moral integrity, by prohibiting torture even in exceptional circumstances such as a state of war or any other public emergency. The entry into force of the Convention on the Rights of the Child, which makes no reference to the right of derogation, provides another example. The non-derogable nature of the norms which confer on children "the right to special protection" or those concerning "the best interests of the child" is strengthened by a diversity of international norms that also consider them non-derogable. The same view should apply regarding the prohibition on the use of capital punishment against persons below 18 years of age, which, in addition to being specified in the Convention, should be interpreted as a norm of customary international law.

### D. Enhancement of non-derogability as a result of progress made in international law in general

106. It should also be emphasized that this dual phenomenon - the enhancement and expansion of those rights whose exercise is non-derogable - is apparent not only in the sphere of international human rights law but also in other spheres of international law. This is why a study of the evolution that has taken place within contemporary international law as a whole is both worthwhile and necessary. To conduct this task, the Special Rapporteur, with the assistance of the Centre for Human Rights and the Association of International Consultants on Human Rights, organized two seminars at Geneva whose conclusions were included in his eighth annual report (E/CN.4/Sub.2/1995/20), the various contributions made by the participants being compiled in a publication to which, for the sake of brevity, the reader is referred. 36/ This publication is particularly noteworthy as it provides a comprehensive overview of trends in this sphere through a thorough examination of the non-derogable nature of the right to self-determination, of certain norms protecting persons belonging to a minority, of the valuable precedents

established by the ILO convention-monitoring bodies and, in particular, by the case law of the International Court of Justice, which has, in several instances, established the non-derogability of the exercise of certain rights under customary international law.

### E. Remedy of habeas corpus as a non-derogable remedy to guarantee protection of the exercise of fundamental human rights

107. The Special Rapporteur has included this remedy among the non-derogable guarantees because it is an essential legal guarantee for the protection of certain non-derogable rights. Essentially, this has been the reasoning of the Inter-American Court of Human Rights which, in its Advisory Opinion No. 8, issued on 30 January 1987 at the request of the Inter-American Commission on Human Rights, stated that, given the provisions of Article 27 (2) of the American Convention, the legal remedies guaranteed in articles 25 (1) (amparo) and 7 (6) (habeas corpus) of the Convention may not be suspended, because they are judicial guarantees essential for the protection of the rights and freedoms whose suspension is prohibited, in conformity with the said provisions, under states of emergency.

108. Advisory Opinion No. 9, given on 6 October 1987 at the request of the Government of Uruguay, went even further than the former since, in addition to reiterating the non-derogability of the remedies of amparo and habeas corpus, it extended non-derogability to any other effective remedy before judges or competent tribunals which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention. The Court added that "the 'essential' judicial guarantees which are not subject to suspension, include those judicial procedures, inherent to representative democracy as a form of government, provided for in the laws of the States Parties as suitable for guaranteeing the full exercise of the rights ... whose suppression or restriction entails the lack of protection of such rights".

109. This second opinion may provide support for a gradualist interpretation, as it not only emphasizes the non-derogable nature of the traditional rights of amparo and habeas corpus, but also extends to other instruments with similar functions on the American continent, such as the Brazilian mandato de segurança (which some authors translate into Spanish as "mandato de amparo"), the Chilean "recurso de protección" (application for protection) and the Colombian "acción de tutela" (action of guardianship).

110. In addition, when the Inter-American Court refers to the non-derogability of the judicial guarantees whose suspension entails the lack of protection of those rights that are not derogable even during states of emergency, it invokes the essential principles of due process of law and the right of defence. Concurrently, the Human Rights Committee has maintained - with reference to article 7 of the International Covenant on Civil and Political Rights - that not even in states of emergency may statements or confessions obtained through torture or ill-treatment be considered admissible as evidence and that, even in such states of emergency, the assistance of counsel should be made available as soon as possible to all detained persons in order to ensure protection for their physical integrity and to enable them to prepare their defence.

111. The lessons to be drawn from the practice of States are also important for this clarification, since experience has shown that Governments generally understand that there must be no limitations on habeas corpus in states of emergency. This is demonstrated by the fact that the Special Rapporteur has received only one notification of the suspension of this remedy, and that was 10 years ago. 37/ Concurrently, the Human Rights Committee, in response to a resolution of the Sub-Commission advocating the preparation of a draft protocol to prohibit any derogation from articles 9, 3 and 14 of the International Covenant on Civil and Political Rights, said that it was convinced that States Parties as a rule understood that the remedies of habeas corpus and amparo should not be restricted in states of emergency. Likewise, the Committee, when considering the report of a State Party, pointed out that measures adopted by a Government to combat terrorism should not affect the exercise of the fundamental rights set forth in the Covenant, and in particular in articles 6, 7 and 9. Regarding article 14, the Committee said that no derogation whatsoever from any of its provisions was possible.

112. This interpretation appears to be confirmed by the precedents established by the same Committee in communication 328/1988 (Zelaya v. Nicaragua) adopted on 20 July 1994, in which the Committee found that there had been a violation of articles 7, 9, 10 and 14 of the Covenant. In this precedent, and in the opinions set forth in the confidential summary records of the debates on communications from individuals, the members of the Committee generally took the view that a State may not derogate from those judicial guarantees which are essential to ensure the observance of non-derogable rights such as the right to life, the right not to be tortured, etc.

113. Given the complementary and non-exclusive nature of the protective norms of international law, it is extremely important to consider the positive linkage that exists with international humanitarian law and, in particular, at what point article 3 common to the four Geneva Conventions, which also establishes fundamental guarantees during internal armed conflicts, enters into force. Moreover, in its ruling on military and paramilitary activities in Nicaragua, the International Court of Justice held that the said guarantees should apply also to armed conflicts of an international character. This article - which the bulk of legal doctrine considers as jus cogens - requires the observance of "judicial guarantees which are recognized as indispensable by civilized peoples" during a civil war and, in the light of case law arising from international conflicts, should apply all the more so when the threat to the life of the nation is less serious.

114. Lastly, in the view of the Special Rapporteur, the most conclusive argument in support of the non-derogability of habeas corpus derives from the articles of the Covenant themselves, and in particular from articles 2 (1) and 2 (2), by virtue of which "Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory ... the rights recognized in the present Covenant", and even to adopt such measures as may be necessary to give effect to them. Even more important, article 2 (3) guarantees to all persons the right to an "effective remedy" if any of the rights recognized in the Covenant are violated. Both the right to life and the right to physical integrity, for example, are rights

whose protection must be guaranteed at all times and in all circumstances; it naturally follows that the "effective remedy" referred to in this article must also be non-derogable.

## IV. PRINCIPAL ANOMALIES OR IRREGULARITIES IN THE APPLICATION OF STATES OF EMERGENCY

115. The study by Mrs. Questiaux clearly showed that if a state of emergency is properly regulated and correctly applied, the balance between the three branches of the State is maintained and it is possible for the domestic monitoring machinery to function satisfactorily; consequently the impact of emergency measures on the exercise of human rights is temporary, limited and compatible with the democratic system of government.

116. On the contrary if the state of emergency departs from the rule of law, then a series of institutional anomalies occur, with serious consequences for the exercise of human rights. In this chapter we shall consider these effects by providing a typology of the most serious anomalies that occur in such situations, before analysing, in chapters V and VI, their consequences on institutions and on the rule of law as well as on the exercise of human rights as a whole.

### A. De facto states of emergency

117. This irregularity takes two forms:

The adoption of emergency measures without previously proclaiming a state of emergency;

The maintenance of such measures despite having officially lifted the state of emergency.

From the legal angle, both situations produce the same result, as they involve failure to comply with the requirement of proclamation which should accompany the exceptional measures. They also point to disregard for national monitoring machinery in introducing, extending or maintaining a state of emergency.

118. Unfortunately, this is quite a common anomaly, which is why the Human Rights Committee and other monitoring bodies have repeatedly had occasion to draw attention to it.

119. In the course of his work from 1985 to 1997, the Special Rapporteur has been able to confirm that during the period at least 20 countries were at one time or another under a de facto state of emergency. In some cases, the Special Rapporteur was able to ascertain only later, following a lengthy exchange of correspondence with the country's authorities or with non-governmental sources, that such a situation obtained. Such was the case of Togo which, in its reply of 10 June 1987, said that although it had had to deal with serious domestic disturbances, there had been no need to declare a state of emergency, and it had been sufficient to declare a curfew for a few days. The Special Rapporteur subsequently ascertained that the restrictions imposed by the curfew in Togo amounted to a de facto state of emergency, which

was why he included it in his annual list. More recently, when considering the most recent periodic report by Togo, the Human Rights Committee found that the various curfews declared by the authorities actually amounted to suspension of the exercise of certain rights protected by the Covenant.

120. In some other cases, the authorities themselves, in a step that deserves encouragement, have recognized that there is or has been a de facto state of emergency. Thus, for example, the Government of the Philippines informed the Special Rapporteur, in a letter dated 10 December 1987, that no state of emergency had been proclaimed or suspended since 1 January 1985 but that during the revolution and in connection with an attempted coup d'état on 28 August 1987, there had been a de facto temporary state of emergency which had lasted a few days, and that the situation had returned to normal immediately afterwards.

121. In view of the frequency of such anomalies nowadays, at the request of the Commission and of the Sub-Commission, the Special Rapporteur has focused attention on the issue and carried out a thorough study of their consequences on the exercise of human rights. To this end, he carried out an on-the-spot study of the repercussions for human rights of the de facto state of emergency in Haiti before the return of the constitutional President Jean Bertrand Aristide, 38/ which will be referred to in more detail in chapter VI.

122. The legal yardstick used by the Special Rapporteur to determine whether or not an actual measure is "exceptional" has been to ascertain whether it goes beyond the restrictions authorized in normal circumstances. If such is the case, it constitutes an exceptional measure whose application is only appropriate within the context of an officially proclaimed state of emergency. As indicated above in respect of the principle of an exceptional threat, international law - as well as the domestic law of States - allows certain restrictions on the exercise of some human rights in normal circumstances, provided these are necessary to preserve public order, morals and health, the rights of others, etc. Consequently, any measures which imply restrictions beyond the limits authorized under normal circumstances are, even if they are not recognized as such, of an exceptional nature.

123. The Special Rapporteur has drawn the attention of the Commission and the Sub-Commission to the incompatibility with international law and with the concurrent criteria established by it of some legislations - generally inspired by common law and based on national security - that authorize the adoption of exceptional measures (such as prolonged administrative detentions, severe restrictions of freedom of expression, freedom of assembly and freedom to demonstrate, and which lay down severe penalties for any breach of them) without the need to proclaim a state of emergency. Moreover, whenever he has ascertained that such measures have been employed, he has included the countries concerned in the annual list on the grounds that a de facto state of emergency is in force there.

124. In this respect, the Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union has drawn attention to the fact that the legislation of most Commonwealth countries includes special laws under which, for purposes of protecting national security, and not necessarily only during a state of emergency, a government authority (usually the Ministry of the

Interior or Defence) is empowered to order the detention of individuals for a specific period, which can usually be extended several times. The Union has interceded in cases involving parliamentarians who have spent more than 20 years in detention without being charged or tried, on the basis of such legislation. 39/

### B. States of emergency not notified

125. This of course involves failure to comply with a formal requirement, destined, as already mentioned in the previous chapter, for the other States parties in the case of an agreement and all the States Members of the United Nations, as regards the work of the Special Rapporteur. Although failure to comply with this requirement does not allow one to prejudge whether or not the proclamation of a state of emergency is in conformity with a country's domestic legislation, as a rule failure to notify is associated with other anomalies.

126. Both the Human Rights Committee and the regional monitoring bodies have demanded strict application of this requirement, and, as was seen in respect of the principle of notification in chapter II, have refused to permit States to invoke the right of derogation whenever the declaration of the state of siege has not been duly notified. Furthermore, in order for the latter to be legally significant, it must satisfy a series of requirements (see chap. II), as was pointed out by the Human Rights Committee in respect of Uruguay 40/ when it considered a number of individual communications. The military Government of the time had merely stated that the country was experiencing "a universally recognized exceptional situation". In most cases, the Committee determined that merely to report the adoption of "urgent security measures" (implying severe restrictions on the functioning of institutions and the exercise of human rights), on the ground of the alleged existence of a state of emergency, was not sufficient, in conformity with the terms of article 4 of the Covenant, to invoke the right of derogation provided for in strictly defined cases. Consequently, after having ascertained that the allegations made by the petitioners were true and emphasized the inadequacy of the content of the notification provided to justify the derogations imposed, the Committee found the de facto Government of Uruguay of the time to have violated numerous provisions of the Covenant. It also demanded that the measures be lifted and the victims compensated.

### C. Perpetuation of states of emergency

127. This anomaly essentially consists in the routine introduction of a state of emergency, followed by its straightforward perpetuation or its repeated renewal or extension. In previous decades this was one of the most common irregularities in Latin America: Paraguay experienced this situation without interruption from 1954 to 1987 and the Inter-American Commission's 1978 report revealed that in actual fact a state of siege had been in force in Paraguay since 1929. A similar example is Colombia, where a state of emergency, in various forms, has been almost uninterruptedly in force for some 40 years; in addition Chile, Argentina, Uruguay and El Salvador, amongst others, have experienced long periods of institutionalized states of emergency under military regimes.

128. In the previous chapter we considered the work of the Human Rights Committee and the observations made by it in connection with its consideration of the periodic reports submitted by States in which exceptional measures had been in force for some time. The annual list prepared by the Special Rapporteur shows that some 30 countries have been in this situation.

129. Such anomalies are particularly serious because they disregard the principle of time limitation which establishes the temporary nature of states of emergency. They also disregard the principle whereby the danger or crisis must be either current or imminent. Discretionary power supplants proportionality. In a word, what was temporary becomes definitive, what was provisional constant and what was exceptional permanent, which means that the exception becomes the rule.

### D. Increasing sophistication and institutionalization of states of emergency

130. These two anomalies are clearly related, as the first of them is a prerequisite for the second and both of them form a perverse mechanism whereby exceptional norms replace the regular constitutional and legal order, and in the end both seek self-justification.

131. A tangible characteristic of the first of these anomalies is the proliferation of emergency norms, which tend to become increasingly complex to the extent that they are intended to apply in parallel with the regular constitutional order, or in addition to it, although they frequently either set retroactive rules or introduce transitional regimes. 41/ In other words, the normal legal order subsists although, parallel to it, a special, para-constitutional legal order begins to take shape, frequently based on so-called "institutional acts" 42/ or their equivalent, which in most cases set themselves above the Constitution itself, so that the normal legal order only remains in force to the extent that it has not been overridden by the former.

132. Although it has no legal significance, we employ the term sophistication as it best describes the web woven by this anomaly, whose complexity becomes impossible to unravel when we find ourselves dealing with laws which, based on this para-constitutional order, appear ordinary inasmuch as they are intended to apply independently of any state of emergency. 43/ Basically, the logic behind this sophistication is nothing more than the wish to secure an extremely complex legal arsenal allowing the authorities to invoke, according to the needs of the moment, either the normal legal system or the special system, although in practice the former is clearly relinquished in favour of the latter. In a word, the perpetuation and sophistication of exceptional regimes are really the two sides of the same coin. In one case, the exception is the rule and in the other normality is the exception.

133. Lastly, the institutionalization of exceptional regimes is perhaps the most refined and dangerous anomaly of all, insofar as it presupposes the existence of the irregularities referred to above, which it aims to legitimize and consolidate by comprehensively reorganizing the country's legal and institutional system.

134. To achieve this end, most dictatorial governments have resorted to pseudo-consultations of the people, in the form of plebiscites or referendums, generally against a background of severe restrictions on the exercise of civil and political rights and public freedoms, as was the case in the Philippines under the Government of President Marcos in 1973 and again in 1979, in Chile under Pinochet and in Uruguay, where it was attempted unsuccessfully on the occasion of the 1980 constitutional referendum.

135. Beyond the political aims and the irregularities used to pursue them, such constitutional reform processes have the following objectives in common:

To legitimize (or more accurately "proclaim"), the lawfulness of actions carried out under "institutional acts";

To incorporate the "institutional acts" into the text of the new Constitution or into its temporary provisions, which as a rule are intended to remain in force for a considerable period of time;

To confer constitutional status on the legal practice of the state of emergency.

136. To sum up, in contrast to de facto emergency regimes, which conceal their real nature beneath the guise of anonymity, in the case of institutionalization the emergency is disguised as the rule of law in order thereby to negate and subvert the latter.

## E. Breakdown of the institutional order

137. As is clear from the situations described above, in virtually all cases the observed irregularities presuppose the existence, de jure or de facto, of an authority which represents the State and which is responsible as such for non-compliance with one or more of the basic requirements governing the state of emergency. Nevertheless, in this section of the report we shall briefly analyse situations in which the crisis is so serious that the State's own institutional framework has broken down and violence has become widespread, mainly affecting the civilian population, with the effect that large sectors of the population are displaced, equilibrium is destroyed as a result of widespread violence and disintegration, etc.

138. The notorious proliferation of conflicts occurring at present and the new ways they develop require a detailed study of this new type of crisis.

139. Although from the legal angle there is no doubt about the applicability of the norms protecting human rights and international humanitarian law, the real concern arises from the limited enforcement and ineffectiveness of these norms from the point of view of preventing the most serious consequences of a crisis. The notorious inability of legal norms alone to prevent the expansion of conflicts makes it essential to identify their causes and contemporary forms, if appropriate machinery is to be instituted to prevent them. This is a matter of particular urgency in view of the huge cost in terms of the human lives which are lost each day in conflicts, essentially among the civilian population 44/ and particularly women and children. In addition, experience has shown - and the tragic fate of the Rwandan refugees in the former Zaire

has confirmed - the fleeting nature of relief operations, which are limited to providing an ad hoc response to humanitarian needs arising from the emergency, and which have neither the aim nor the vocation to address the structural or other factors causing it.

140. A rough idea of the scale of the contemporary problem posed by conflicts is given by the fact that more than 40 per cent of the official development assistance channelled through the United Nations in recent years has been for relief and emergency operations. In three years alone the United Nations invested more than 2 billion dollars in Somalia. 45/

141. Another universal phenomenon which is closely linked to the increase in conflicts and to the forms they assume, poverty, is not only expanding in most countries but also becoming more acute, taking on dramatic proportions in some regions of the world. Paradoxically, and with telling frequency - as in Sub-Saharan Africa - the two phenomena are juxtaposed. This shows the perverse reciprocity and feedback connection between these two scourges of mankind, since while poverty affects the gestation and development of conflicts, the latter in turn are major causes of poverty. A striking illustration of this is provided by the case of Sierra Leone, where on 25 May 1997 (when the Special Rapporteur was on the point of concluding this report) a curfew was declared as a result of a coup d'état, which overthrew the Government of President Ahmad Tajen Kabbah. There is no doubt that in Sierra Leone the long years of civil war have caused immeasurable economic harm, forcing more than 70 per cent of the population to live below the poverty line as a result of a decline of more than 20 per cent in real wages. On the other hand, there is no doubt either that it was the long economic decline of the 1980s, during which real wages lost 80 per cent of their value, that created conditions propitious to the subsequent upheaval.

142. The economic crisis that preceded the tragic events occurring in the Great Lakes Region of Africa is somewhat similar. In addition to the undoubted predominance of cultural factors, there is no denying the negative impact of the earlier economic decline, through successive structural adjustments, which had the effect of diminishing the role of the State, and the worsening of ethnic tension resulting from dwindling job opportunities. Lastly, poverty should not be considered only in terms of its direct link with conflicts, but also in terms of its impact on other factors of conflict, such as enormous internal and international migratory pressures, which in turn lead to large-scale population displacements; these not only uproot populations but also increase poverty. 46/

143. Another extremely disturbing phenomenon is the way in which such conflicts nowadays are related to minorities or are derived from ethic, religious, national, and other factors, rather than being chiefly ideologically inspired, as was the case until the end of the previous decade. This partly accounts for the new forms taken on by conflicts and the pronounced tendency towards widespread violence which mainly affects the civilian population.

144. It is estimated that there are 70 countries with significant minorities among their population. Beyond those cultural and historical factors that frequently affect the development of conflicts, it is impossible to ignore

that some eminently economic factors, such as the prosperity of some and the impoverishment of others, when they affect some sectors more than others, constitute a growing source of social tension in many countries, which can lead directly to such conflicts. Moreover, all this is happening against a background of a gradual dwindling of the State's role and in many cases of outright neglect for the social functions it has traditionally performed. This has undoubtedly weakened the State's hitherto leading role as a safety net containing social conflicts and as an institutional framework providing the population with a sense of participating in a common destiny. The sense of helplessness and social fracture this produces, and above all the lack of any outlook which all members of society share equally not only emphasize and accentuate differences within society, but frequently exacerbate its inherent rivalries. It is against this background of societies repeatedly traumatized by economic, social, cultural and other factors that such extreme situations develop, in which the breakdown of the institutional order opens the floodgates to widespread violence and massacres of the civilian population, frequently leading in the end to actual genocide.

## V. IMPACT OF STATES OF EMERGENCY ON INSTITUTIONS AND ON THE RULE OF LAW

### A. Impact on institutions

145. As a general rule one of the three branches of government - generally the legislature - decides on the legality of a declaration made by another branch - generally the executive, with or without the agreement of the Council of Ministers - while the judiciary is empowered to examine the legality of measures affecting the exercise of human rights in specific cases. In some countries the judiciary is even empowered to decide on the legality of the state of emergency as such, for example on the occasion of examining a habeas corpus application.

146. Nevertheless, as we have seen, from minor irregularities to the most serious, the institutions' balance is invariably altered under states of emergency and supervisory mechanisms are weakened and may even disappear.

147. As a result of the growing sophistication and institutionalization of states of emergency, extensive powers have generally been exercised by those in charge of the executive branch (the president or military junta), very often accompanied by the elimination of the independence of the parliament and the persecution and/or detention of its members, 47/ or even the outright dissolution of parliament. To fill the gap left by the parliament, the executive itself often establishes commissions which provide advisory assistance in the legislative sphere without performing legislative functions as such. 48/

148. In the case of Paraguay, during nearly four decades of the Stroessner regime, on a routine basis every six months, Parliament approved the extension of the state of siege proposed by the executive, thus legalizing what was no more than an obvious abuse of this expedient. In Haiti, under the Duvalier regime, it was standard practice for over two decades for the legislature to end its brief annual sessions by conferring full powers on the executive and suspending the most important constitutional guarantees during the long recess

period. As might be imagined, under such circumstances the judiciary, whether de facto or de jure, lacks the authority to monitor the timeliness and legality of the introduction of the state of emergency (a power that is reserved for the political authorities), being equally powerless to oppose the specific measures affecting individual human rights, whether detentions, expulsions from the territory, relegation to or confinement in a particular part of the territory, etc.

149. In such cases, it is also common for the majority of the members of the judiciary to be removed from office and for the ordinary courts to be replaced by military courts to try people for alleged political offences, culminating in a Supreme Court of Justice that legalizes "institutional acts" or their equivalent, or confers a supra-constitutional status on emergency rules adopted by the regime. In this connection, the Special Rapporteur of the Commission on Human Rights on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers has noted that the promulgation of decrees instituting a state of emergency often leads to the mass dismissal of judges, the establishment of special courts and the restriction or suspension of judicial review. In support of his statements the Special Rapporteur adds that the impairment of the judiciary and the harassment of lawyers are not infrequent during states of emergency.

150. These irregularities ultimately bring about an actual institutional transformation, the main effect of which is to replace the concept of the separation and independence of powers with that of a hierarchy of powers, favouring the executive, which in some cases, is in its turn subordinated to the military.

151. To avoid such anomalies and their adverse effects on institutions, the Special Rapporteur proposes the following standard norms:

Judiciary:

The legislation shall stipulate that no steps taken under a state of emergency shall:

(a) Impair the effect of the provisions of the Constitution or Fundamental Law or the legislation governing the appointment, mandate and privileges and immunities of the members of the judiciary or the independence and impartiality of the judiciary.

(b) Restrict the authority of the courts:

(i) To examine the compatibility of a declaration of a state of emergency with the laws, the Constitution and the obligations deriving from international law, or to decide that such a declaration is illegal or unconstitutional, in the event of incompatibility;

(ii) To examine the compatibility of any measures adopted by a public authority with the declaration of the state of emergency;

(iii) To take legal steps designed to enforce or protect rights recognized by the Constitution or Fundamental Law and by national and international law, the effective exercise of which is not affected by the declaration of a state of emergency;

(iv) To try criminal cases, including offences connected with the state of emergency.

Legislature:

The legislation shall stipulate that Parliament may not be dissolved or suspended during a state of emergency and that parliamentarians' immunities and privileges must remain intact in order to ensure that they are able to monitor their constituents' enjoyment of human rights. The legislation shall likewise stipulate that no other constitutionally established monitoring body shall be dissolved or suspended.

The legislation shall grant members of Parliament, or any other constitutionally established body responsible for monitoring the legality of a declaration of a state of emergency, immunity in respect of any measures adopted under the declaration which may impede or restrict their participation in deliberations concerning the ratification, extension or lifting of the state of emergency declared by the executive.

## B. Impact on the rule of law

152. From the legal point of view, the anomalies described above generally go hand-in-hand with major transformations of substantive criminal law (definition of offences and scale of penalties), procedural criminal law (procedural guarantees) and the rules governing competence. 49/ As far as procedural rules are concerned, the more obvious restrictions usually relate to defence rights and to the public nature of hearings. In South Africa, for example, during the racist regime, publishing the name of a person detained under the Terrorism Act without police authorization was prohibited and severely punished under the Second Police Secret Act, No. 1306 of 1980.

153. With regard to substantive rules, there is a dangerous tendency to lay down extremely vague definitions that potentially place a large number of persons outside the law, and have effects such as extending the definition of complicity, or weakening the presumption of innocence, etc. Similarly, an escalation of repression usually follows changes in the rules governing competence, in particular through the retroactive application of criminal legislation, so that, while unlike substantive legislation it is not prohibited, it nevertheless entails similar consequences under the state of emergency. We can imagine, for example, the situation of individuals being tried by an ordinary court who, as a result of the declaration of a state of emergency, find themselves being tried in secret by a military court for the same offence.

154. This steady deterioration of the principle of legality eventually leads to a veritable transformation of the rule of law, whereby the state of

emergency degenerates into a factor of escalation of the crisis and becomes an instrument for repressing the opposition and dissenters. The impact of both these changes on human rights as a whole, as we shall see below, is ultimately so serious and destructive that we have chosen to give it separate treatment.

## VI. EFFECTS OF STATES OF EMERGENCY ON HUMAN RIGHTS

155. The most valuable lesson that can be drawn from the practice of the international monitoring bodies and from the Special Rapporteur's own experience is the certainty that, to the extent that the norms and principles governing the state of emergency are respected, its impact on the functioning of the institutions, the validity of the rule of law and the enjoyment of human rights will necessarily be limited and compatible with a democratic system of government.

156. As indicated in the annual reports prepared by the Special Rapporteur, the methods of implementing a state of emergency and its effects encompass a variety of situations:

> The state of emergency has been introduced for a short period and with limited legal effects, as for example, in Wallis and Futuna, where the measures were in force for only a few days, from 26 to 30 October 1986; in Argentina, where the emergency measures affected the freedom of movement of only 12 individuals, for a period of less than 30 days, in May 1989; in Panama, where the state of emergency was in force from 10 to 29 June 1987, and in Canada, where a state of emergency was introduced in the Province of Manitoba from 23 July to 4 August 1989.
>
> The state of emergency has been introduced for a longer period and suspends only a few derogable rights, as in New Caledonia from 12 January to 30 June 1985; in Kuwait from 26 February to 26 June 1991, and in Senegal from 29 February to 20 May 1988, and again from 28 April to 19 May 1989.
>
> The state of emergency is maintained in force, and the longer it continues the more the anomalies accumulate and the more human rights are impaired, with rights which are inalienable in nature being eventually affected. Such was the case, inter alia, in the countries of the Southern Cone which were under military dictatorships during the 1970s and part of the 1980s, and South Africa and Namibia during the regimes which applied the apartheid system.

157. It is this growing distortion in the application of states of emergency that we shall use as a basis for explaining the deterioration it causes in the area of human rights.

### A. Rights regularly affected

158. On the basis of the information which Governments have provided the Special Rapporteur, 50/ the following are the rights whose exercise is most frequently suspended.

Right to liberty and security of person, set forth in article 9 of the International Covenant on Civil and Political Rights;

Right to liberty of movement and freedom to choose residence throughout the national territory, contained in article 12, paragraph 1 of the Covenant, and, to a lesser extent, the right freely to leave any country and to re-enter one's own, laid down in article 12, paragraphs 2 and 4;

Right to freedom from interference with one's home and correspondence, set out in article 17 of the Covenant;

Right of peaceful assembly and right to demonstrate, expressed in article 21 of the Covenant;

Right to freedom of opinion and expression, laid down in article 19 of the Covenant;

Right to strike - one of the rights most affected in this type of situation - laid down in article 8, paragraph (d) of the International Covenant on Economic, Social and Cultural Rights, which, unlike the International Covenant on Civil and Political Rights, makes no provision for derogation from any of the rights it establishes, even in crisis situations.

159. The Special Rapporteur received only one notification, from the Government of Nicaragua on 18 June 1987, of suspension of habeas corpus "in respect of offences against national security and public order". The notification was later retracted, notably as a result of the Inter-American Court of Human Rights, in its Advisory Opinion No. 8, finding the suspension of habeas corpus to be incompatible with one of the essential guarantees laid down in article 27, paragraph 2 of the American Convention.

160. This is also the case with respect to the right to a fair trial, laid down in article 14 of the International Covenant on Civil and Political Rights, of whose suspension the Special Rapporteur has received only a single notification, from Sri Lanka, referring exclusively to paragraph 3 (rights of the accused) and only in respect of defence rights. 51/

## B. Arbitrary detentions and states of emergency

161. The right to personal liberty established in article 9 of the Covenant is one of the rights most frequently affected by this type of situation, to the point that it is rare for a state of emergency not to involve the suspension of this right. For this reason it is worth reviewing, albeit briefly, the characteristics of detentions specifically under states of emergency, which range from custody in special facilities to detention in actual prison establishments. In other cases, confinement takes place in "re-education" camps or even in secret places, which has frequently led to the practice of enforced disappearance. Lastly, such practices take different forms, related to the magnitude, duration, diversity and complexity of the detentions.

Magnitude

162. An indication of the magnitude of the detentions applied in this type of situation is provided by the latest report of the Government of Chile to the Special Rapporteur, which states that under the de facto regime, during the period 1973-1980, some 200,000 individuals were deprived of their liberty. According to reliable sources, one out of every three persons was detained or interrogated in Uruguay during the "prompt security measures" implemented by the military regime which governed the country from 1971 to 1985. In South Africa, where this type of measure was also used to perpetuate the scourge of apartheid, under the Internal Security Act, from June 1986 to August 1987, some 30,000 persons were detained for a period of more than 30 days, 40 per cent of whom were under 18 years of age. Finally, according to a report by the Special Rapporteur on the practice of administrative detention, by Mr. Louis Joinet, after the Viet Nam war, from 1975 to 1976 between 10,000 and 15,000 people were detained in "re-education" camps. 52/

Duration

163. Very often people detained at the disposal of the executive during states of emergency, especially on grounds of security and frequently on a preventive basis, remain in detention indefinitely. There have been cases where the authorities have ordered administrative detention for people charged with offences but acquitted by the courts or have kept them in detention after their sentence had been fully served. Mr. Joinet's report also indicates that 120 people detained in re-education camps in Viet Nam were very close to completing 15 years in detention. The Inter-American Commission on Human Rights has repeatedly drawn attention to the perpetuation of states of emergency on the Latin American continent and to the abusive character of prolonged detentions that accompany this process. 53/

Complexity

164. During emergency situations, Governments frequently make use of ordinary procedural measures (such as detention on legitimate charges) simultaneously with or immediately after exceptional measures. Measures are frequently juxtaposed in this way on the American continent and in some African and Asian countries. In this connection, the Inter-Parliamentary Union has had occasion to deal with cases of parliamentarians from African, Asian and Latin American countries who have been detained for years under such twofold measures. In Argentina, for example, during the various de facto regimes prior to 10 December 1983, thousands of citizens were detained at the disposal of the executive and most of those who were charged and tried were also placed in administrative detention. They were thus unable to enjoy either conditional release, parole or even unconditional release, when they had been acquitted or had completed their sentence. To put it simply, the judge could order release but the executive had already ordered detention.

Diversity

165. Finally, some situations arise which cannot necessarily be described by the word detention, but which nevertheless can cause serious impairment of the right to personal liberty. We are referring, for example, to the type of

arrest ("arresto") which gives the executive the power, during a state of emergency, to hold certain individuals in "places that are not prisons". This is rarely the case in practice, and the individuals concerned are usually held in actual jails, so that the arrest becomes detention and the latter takes on an arbitrary character. What is more, according to the case law of Chilean courts under the Pinochet regime, authority to "arrest" included authority to order solitary confinement, and the lack of any provision requiring disclosure of the place where a person was being held legitimized the use of secret detention. The restriction on freedom of movement that is imposed when a curfew is introduced, or when certain persons are prohibited from leaving a particular place, may under certain circumstances become a serious attack on personal liberty. Examples include banishment to or forced stays in places or localities which on account of their remoteness or isolation may involve more hardship than prison. In addition, such measures usually entail constant transfers to places far away from the individual's place of residence, making contact with the family extremely difficult.

### C. Impact on human rights of de facto emergency measures

166. Beyond strictly legal and institutional aspects, what we would like to discuss now is the adverse impact of de facto emergency regimes on human rights as a whole. Two cases will serve to illustrate the impact of this anomaly.

167. In Haiti (which, as indicated in the introduction, was the subject of a special study), during the period between the coup d'état of 29 September 1991 and the return of President Aristide, with no prior proclamation of a state of siege as stipulated by the Haitian Constitution, measures severely restricting the exercise of most human rights were adopted, which led to a situation of large-scale systematic violations of human rights. More than 1,000 people in fact died in the months following the coup d'état, most as a result of extrajudicial executions. In a single year 5,096 cases were reported of unlawful detentions in prisons where torture and other acts of brutality were routinely practised. As a result of restrictions on freedom of opinion and expression, journalists of the written and oral press were subjected to repeated threats and acts of intimidation; some were murdered or forced to leave the country, and many radio stations were attacked and vandalized.

168. When the Human Rights Committee considered the latest periodic report of Togo, after noting Togo's failure to fulfil its obligation to notify the Secretary-General of the suspension of certain rights enshrined in the Covenant - as a result of the curfews ordered during the period of transition to democracy - it deplored "the large number of cases of summary and arbitrary executions ... committed by members of the army, security or other forces during the period under review. It is deeply concerned that those violations were not followed by any inquiries or investigations, that the perpetrators of such acts were neither brought to justice nor punished, and that the victims were not compensated".

### D. Impact on inalienable rights of states of emergency in the event of an accumulation of anomalies

169. The most valuable lesson we have been able to draw from our long-term examination of developments in states of emergency is their dangerous tendency to accumulate anomalies when they are applied abusively and perpetuated. As irregularities are compounded, the number of human rights affected increases and even those fundamental rights from which no derogation is permitted are ultimately affected. This can be seen from the numerous attacks on the right to life and physical, psychological and moral integrity, inter alia, described in the successive reports of the Special Rapporteurs of the Commission on Human Rights on extrajudicial, summary or arbitrary executions and on the question of torture and other cruel, inhuman or degrading treatment or punishment, and the successive reports submitted by the Working Group on Enforced or Involuntary Disappearances and the various international monitoring bodies, in particular the Human Rights Committee. An Amnesty International study on torture and violations of the right to life during states of emergencies is very interesting in this respect, as it emphasizes the way in which states of emergency can, in fact, facilitate the violation of non-derogable rights. 54/

### E. Generalized violence

170. This is the sort of situation described in chapter IV, in which violence becomes widespread and reaches uncontrollable levels, ultimately disrupting the institutional order and leading to large-scale, generalized violations of all human rights. It was against such a background that many members of militias involved in the clashes that led to the break-up of the former Yugoslavia have been charged with committing war crimes and crimes against humanity. 55/ This was also the backdrop for the large-scale massacres committed in the Great Lakes region of Africa.

171. A clear illustration of the consequences of this type of conflict is provided by Act No. 9/96 of 8 September 1996, adopted by the Rwanda authorities. In the preamble to the Act, the National Assembly recognizes that "as from 6 April 1994, the Republic of Rwanda has been undergoing a public emergency which threatens the life of the nation in the meaning of article 4, paragraph 1 of the International Covenant on Civil and Political Rights". It then recognizes that the country has been in a situation of severe disturbance and internal armed conflict that has impeded the functioning of the courts. Furthermore, the Act recognizes that this situation has brought about a complete breakdown of institutions and the judiciary. Lastly, the preamble itself states that genocide and massacres constituting crimes against humanity have been committed in Rwanda.

### F. Impact on economic, social and cultural rights

172. States of emergency not only affect civil and political rights, but also have a considerable impact on economic, social and cultural rights. In his study on the situation in Haiti, the Special Rapporteur made an in-depth study of this issue. Haiti is known to be the poorest country in Latin America and among the 20 poorest countries in the world. The repression unleashed during the de facto regime further aggravated the precariourness of the people's

economic, social and cultural rights, to the point that the right to life was threatened by both the military's repression and by the economic and social conditions created by it. The repression was also very harsh for the small self-help bodies that promote agricultural and literacy projects or projects for improving the neighbourhood, etc. Social workers, secular and religious, and members of community organizations were in turn harshly persecuted, and most of the shelters for street children were systematically attacked by the military. The atmosphere of insecurity and fear created by the repression forced much of the population to move and to seek refuge in other provinces, abandoning their homes and smallholdings, or to leave the country. The 1993 report of the Inter-American Commission on Human Rights indicated that more than 300,000 people had been affected by the mass displacements.

### G. Impact of the state of emergency on the human rights of certain vulnerable groups or sectors of the population

173. In several of his annual reports, the Special Rapporteur has emphasized the need to strengthen the protection of all people or groups of people, who for various reasons find themselves in a particularly vulnerable situation. This is the case for refugees, victims of armed conflicts, minorities, indigenous populations, migrant workers, disabled people and other vulnerable groups.

174. UNHCR has repeatedly told the Special Rapporteur that mass violations of human rights lead to persecution, which in many cases forces the victims to seek asylum. If there is a state of emergency in the country of asylum, this in turn has an adverse effect on the protection of refugees (who are obviously in a more vulnerable situation than the country's nationals), especially when the emergency measures entail basic restrictions on human rights.

175. Because of the nature of their work, journalists, trade-union leaders, parliamentarians, human rights workers, etc. could obviously be added to the above-mentioned categories.

176. In the case of parliamentarians, as we have seen, during "anomalous" states of emergency the dissolution of Parliament often goes together with the detention and/or expulsion from the country of the parliamentarians themselves. Journalists who resist restrictions on their freedom of expression are frequently subject to similar measures. Another sector regularly affected is the trade-union leadership, as the work of the ILO Committee on Freedom of Association has shown. By way of illustration, in his 1989 report the Special Rapporteur indicated that he was in possession of information to the effect that, under an emergency regime, the South African security forces had killed seven striking workers in a single day.

177. According to the Special Rapporteur's latest report to the Commission on Human Rights on the situation of human rights in Afghanistan (E/CN.4/1997/59) in regions of the country under the control of the Taliban movement, women are strictly forbidden - under threat of ill-treatment and even death - to receive education or to hold a job outside the home. The justifications most frequently given by the authorities are to the effect that: "we are in an

emergency situation", which means: "the resumption of female employment and education will only take place when security conditions are restored" and "we are in a situation of war and want to restore peace".

178. Lastly, the situation of children, especially street children, is particularly serious during states of emergency. As an example, in his 1989 report the Special Rapporteur indicated that he was in possession of information to the effect that the South African security forces, under an emergency regime set up by the authorities at the time, had killed more than 200 children. Mrs. Graça Machel's 1996 report to the General Assembly, "Impact of armed conflict on children", is extremely significant in this respect. The Special Rapporteur cannot but fully agree with the expert of the Secretary-General when she concludes that among the issues that demand further investigation are "operational issues affecting the protection of children in emergencies [and] child-centred approaches to the prevention of conflict and to reconstruction and development" (A/51/1306, para. 315).

## CONCLUSIONS AND RECOMMENDATIONS

### Conclusions

179. For the sake of brevity, the Special Rapporteur will in this instance limit himself to a quantitative assessment of the number of states of emergency and the frequency with which States take measures of this type, while reserving the possibility of including in his final report to the Commission on Human Rights a summary assessment of the most important conclusions that can be drawn from this study.

180. According to the successive reports submitted by the Special Rapporteur between January 1985 and May 1997, some 100 States or territories - in other words, over half the Member States of the United Nations - have at some point been de jure or de facto under a state of emergency. The fact that during the same period many have extended emergency measures or lifted and then reintroduced them, shows that states of emergency have been proclaimed, extended or maintained in some form much more frequently in the past dozen years or so.

181. If the list of countries which have proclaimed, extended or terminated a state of emergency in the last 12 years, as indicated in this report, were to be projected onto a map of the world, we would note with concern that the resulting area would cover nearly three-quarters of the Earth's surface and leave no geographical region unaffected. We would also note that in countries so geographically far removed, with such dissimilar legal systems, as the United States and China, or located at such polar extremes as the Russian Federation and Argentina, including such intensely conflictual regions as the Middle East, the former Yugoslavia and certain African countries, in all cases, Governments have chosen to adopt de facto (in the case of the latter countries) or de jure (in the case of the former) emergency measures in order to cope with their successive crises.

182. A political reading of this original legal map of the world would tell us that, not only is mankind not living in stable conditions, but there is a dangerous tendency world-wide for the exception to become the rule.

Recommendations

183. The Special Rapporteur submits the following recommendations for consideration by the members of the Sub-Commission and the States and organizations which participated in the forty-ninth session, on the understanding that they will be expanded or redrafted in the light of the comments and suggestions made.

1. Recommendations to States

184. The Special Rapporteur urges States that have not yet done so:

To proceed, on an urgent basis, to bring their domestic legislation into line with the norms and principles of international law in respect of states of emergency;

In so doing, to strengthen their internal control mechanisms in order to guarantee the proper implementation of the norms that govern them;

In adapting their legislation, to use the principles and norms prepared by the Special Rapporteur to that effect and given in this study, and,

To request assistance for that purpose from the Advisory Services, Technical Assistance and Information Branch of the United Nations Centre for Human Rights.

185. He likewise recommends that States continue to cooperate with the Special Rapporteur and provide him with as detailed information as possible in the event of any proclamation, extension or termination of a state of emergency. This recommendation is extremely significant in respect of the obligation to notify the other States through the depositaries of the international treaties to which they are party.

2. Recommendations to the Human Rights Committee

186. The Special Rapporteur welcomes the new rules of procedure of the Human Rights Committee, under which Governments which have declared a state of emergency may be requested to submit a report, as this facilitates and strengthens control mechanisms.

187. The Special Rapporteur proposes that the Human Rights Committee should consider the possibility of:

Establishing a mechanism enabling it to maintain under consideration those countries which have adopted emergency measures, for the purpose of monitoring the way such measures evolve and their impact on the human rights protected in the Covenant;

Drafting a new general comment on article 4 covering the developments which have occurred, norms and principles, monitoring criteria and the extension resulting from precedents of non-derogable rights, in particular habeas corpus.

### 3. Recommendations to the Commission on Human Rights

188. The Special Rapporteur reiterates the recommendation contained in his eighth report (E/CN.4/Sub.2/1995/20) to the effect that the Commission on Human Rights should appoint a special rapporteur or set up a working group to carry out that task. This study further supports such a recommendation, inasmuch as it once again emphasizes how frequently Governments resort to introducing states of emergency and the adverse impact of the latter on human rights when the norms governing them are not respected.

189. Taking into account the magnitude of the current crises and conflicts, the Commission might:

Also consider the possibility of convening a special meeting for the purpose of examining the issue of conflicts with a view to establishing more effective mechanisms for containing, preventing and attenuating their effects;

Establish, as a matter of high priority, the elaboration of minimum humanitarian norms applicable to all situations, which will include and consolidate the progress already achieved in the case law of the various monitoring bodies.

### 4. Recommendations to the Sub-Commission

190. The Special Rapporteur proposes that the Sub-Commission should:

Maintain the study of the question of human rights and states of emergency as one of the highest priority items on its agenda, and

Appoint another of its members to prepare the annual list of States that have proclaimed, extended or lifted a state of emergency, until such time as the Commission on Human Rights appoints a Special Rapporteur.

191. The Special Rapporteur suggests that the Sub-Commission should in addition organize a meeting of experts to discuss the question of human rights and states of emergency and invite the special rapporteurs and members of working groups whose work encompasses, in one way or another, the implementation of article 4 of the International Covenant on Civil and Political Rights to participate in the discussions.

### 5. Recommendations to special rapporteurs and working groups

192. The Special Rapporteur suggests that special rapporteurs and working groups pay particular attention to the impact of emergency situations on the specific area covered by their respective mandates and that, as the Working Group on Arbitrary Detention has repeatedly stated, they should avail themselves of the valuable collaboration which the Special Rapporteur on human rights and states of emergency would be able to provide, in the event that such a Special Rapporteur were to be appointed by the Commission.

## 6. Recommendations to the High Commissioner for Human Rights

193. The Special Rapporteur suggests that the High Commissioner should:

Give high priority to the advisory assistance activities of the Centre for Human Rights relating to states of emergency;

Draw up a list of specialists in the different legal systems to carry out this task;

Increase the presence of human rights observers in the field wherever serious crises or conflicts are occurring, and prepare for them a consistent set of guidelines, as well as standards and directives for the use of the information gathered by these observers within the United Nations system;

In close cooperation with the Secretary-General, increasingly focus her efforts on activities relating to conflict prevention, peaceful settlement of conflicts, mediation and other preventive diplomacy mechanisms;

Consider the possibility of organizing, in coordination with other United Nations agencies, an international seminar of experts to examine the question of conflicts with a view to eliciting proposals regarding ways of attacking their causes, preventing them from breaking out and alleviating their consequences;

Establish, through the appointment within the framework of the Centre for Human Rights of a "focal point" on the implementation of article 4 of the International Covenant on Civil and Political Rights, a responsive mechanism for exchange of information between the Special Rapporteur on states of emergency and the Human Rights Committee, as well as the special rapporteurs and working groups whose work encompasses the implementation of article 4 in one form or another.

## Notes

1/ E/CN.4/Sub.2/1982/15.

2/ See resolution 10 (XXX) of the Sub-Commission, resolution 17 (XXXV) of the Commission and resolution 1979/34 of the Economic and Social Council.

3/ See resolution 1987/25 of the Sub-Commission.

4/ E/CN.4/Sub.2/1991/28/Rev.1, annex I. Some of the model norms have been updated in this report.

5/ E/CN.4/Sub.2/1995/20.

6/ See resolution 1996/30 of the Sub-Commission and decision 1997/110 of the Commission on Human Rights.

7/ Nevertheless, no provisions concerning the suspension of rights appear in many major human rights treaties, including the International Covenant on Economic, Social and Cultural Rights, ILO Conventions Nos. 29, 87, 98 and 105 concerning Forced Labour, Freedom of Association and Protection of the Right to Organise, the Application of the Principles of the Right to Organise and to Bargain Collectively and concerning the Abolition of Forced Labour, the 1951 Convention relating to the Status of Refugees, the 1989 Convention on the Rights of the Child, the African Charter of Human and Peoples' Rights, and of course the various conventions of international humanitarian law which apply precisely in time of emergency.

8/ Inspired by those already established by Mrs. Questiaux in her 1982 report, which were approved by the Commission on Human Rights.

9/ In this respect, it is worth recalling the heated debates within the Commission on Human Rights and the Sub-Commission throughout the 1970s, in which the majority of the authoritarian Governments of the time opposed any form of international monitoring. Later, when international monitoring finally prevailed, the same Governments argued that it should be restricted to times of peace and normality.

10/ Further still, by virtue of its statute, the International Committee of the Red Cross can offer its services, of a strictly humanitarian nature such as visits to detainees, even in situations that do not constitute armed conflicts but which, because they involve serious disturbances of internal public order, give rise to detentions on grounds of security.

11/ In their time, the Romans, who undoubtedly abused the institution from which the current state of emergency originated, stated that "the purpose of dictatorship (i.e. the assignment of extraordinary powers) must be to defend the Republic, not to crush it".

12/ In The International Law of Human Rights and States of Exception with special reference to the preparatory works and the case law of the international monitoring organs, 1996, Ms. A.-L. Svensson-McCarthy affirms: "the notion of a democratic society is inherent in the international law of human rights and constitutes an objective parameter which determines the legitimate aim and necessity of such restrictions".

13/ Complaints (petition) Nos. 6780/74 and 6950/75, Report of 10 July 1976, para. 527.

14/ General Assembly, Official Records, Thirty-fifth Session, Supplement No. 40 (A/35/40), para. 297.

15/ See the summary of the preparatory work on the International Covenant on Civil and Political Rights prepared by the Secretary-General, document A/2929 (1955), para. 41, quoted in O'Donnell, Commentary to the Siracusa Principles, paras. 25 and 26.

16/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), para. 690.

17/ Official Records of the General Assembly, Forty-ninth Session (A/49/40), paras. 189 and 253 respectively.

18/ The reinclusion of the Republic of Korea in the 1997 report is based on information provided by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression following his visit to the country (see E/CN.4/1996/39/Add.1, para. 21).

19/ See documents A/33/331 and E/CN.4/1310.

20/ See document CCPR/1/Add.25.

21/ See "Operation and Judicial Decisions of the Committee on Human Rights of Parliamentarians of the Inter-Parliamentary Union, 1 January 1977-4 February 1993, Leandro Despouy, p. 37, Case KEN/03-CL/78/123. Some years later, with reference to a case in Malaysia where a state of emergency had been in force since 13 May 1969, the Inter-Parliamentary Council repeated that although the imposition of measures restricting the rights and freedoms allowed by the international legal instruments on human rights is conceivable in exceptional situations that endanger the nation and the existence of which has been officially proclaimed, it is essential nevertheless that the imposition of such measures should be "to the extent strictly required by the exigencies of the situation" and that it should be exceptional and of a temporary nature (Case MAL/07-14-CL/88/142).

22/ See Report of the European Commission of Human Rights, 1969, document 15.

23/ See European Commission of Human Rights, series B, 1960-1961.

24/ Ibid., note 8.

25/ In even broader terms, both the International Covenant on Civil and Political Rights and the American Convention on Human Rights also allow this possibility, permitting the restriction of the exercise of specific rights in situations of normality when that is done for reasons of public order, national security, public morals and the rights of others: see, inter alia, articles 12(3), 18(3), 19(3), 21 and 22(2) of the Covenant, articles 8(2), 9(2) and 11(2) of the European Convention on Human Rights, and articles 12(3), 15 and 16 of the American Convention on Human Rights.

26/ This concerned a complaint made by Greece against the United Kingdom on account of the declaration of a state of emergency in Cyprus, at that time a British colony.

27/ Report submitted by the special commission set up under article 26 of the ILO Constitution to consider the complaints related to the suspension by Greece of Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize of 1948 and Convention No. 98 concerning the Right to Organize and to Bargain Collectively of 1949, on the occasion of the coup d'état of the colonels.

28/ See also, Oppenheim, International Law; Giraud, Recopilación de Cursos en la Academia de Derecho Internacional; and Jessup, A Modern Law of Nations.

29/ It should be pointed out that neither Convention contains any provision concerning emergencies, so that the report had to be prepared on the basis of general principles of international law.

30/ Case of Ireland versus United Kingdom.

31/ See E/CN.4/Sub.2/1990/33, para. 17.

32/ See Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex VII.

33/ In U.N. Covenant on Civil and Political Rights - CCPR Commentary, 1993.

34/ Nevertheless, no provisions concerning suspension appear in many major human rights treaties, including the International Covenant on Economic, Social and Cultural Rights, ILO Conventions Nos. 29, 87, 98 and 105 concerning Forced Labour, Freedom of Association and Protection of the Right to Organise, the Application of the Principles of the Right to Organise and to Bargain Collectively and concerning the Abolition of Forced Labour, the 1951 Convention relating to the Status of Refugees, the 1989 Convention on the Rights of the Child, the African Charter of Human and Peoples' Rights, and of course, the various conventions of international humanitarian law, which apply precisely in time of emergency.

35/ See Manfred Novak, "U.N. Covenant on Civil and Political Rights - CCPR Commentary", 1993.

36/ Association of International Consultants on Human Rights, Droits Intangibles et états d'exception (Brussels, Editions Bruylant, 1996).

37/ Notification received from Nicaragua on 18 June 1987 (see E/CN.4/Sub.2/1987/19/Rev.1).

38/ See, E/CN.4/Sub.2/1993/23, chap. III.

39/ Leandro Despouy, Functioning and "Jurisprudence" of the Committee on the Human Rights of Parliamentarians of the Inter-Parliamentary Union: 1 January 1977-4 February 1993, p. 205.

40/ Landinelli Silva case, 1978.

41/ See the report by Mrs. N. Questiaux, E/CN.4/Sub.2/1982/15, paras. 118-128, Complex states of emergency, and Council of Europe document AS/Pol/PR/COLL/DHAL/33 of October 1981, by Leandro Despouy, entitled "The exception is the rule in Latin America".

42/ As was the case in Brazil, Argentina, Chile and Uruguay under the most recent military regimes.

43/ As was the case for most of the national security laws in Brazil, Argentina, Uruguay, etc.

44/ In contrast with the First World War, in which only 5 per cent of the victims were civilians, the percentage has risen to between 80 and 90 per cent.

45/ The first four months of the troop deployment in Somalia cost the United States 750 million dollars, i.e. the equivalent of UNICEF's annual budget.

46/ See, "Conflict prevention and poverty alleviation", Organization for Economic Cooperation and Development, document DCD 897a/ANN2, prepared by the Special Rapporteur at the request of UNDP.

47/ Between 1977 and 19?3, a large proportion of claims dealt with by the Inter-Parliamentary Union's Committee on the Human Rights of Parliamentarians concerned parliamentarians in countries under declared or de facto states of emergency.

48/ This was the role played in Chile and Uruguay by the Council of State and in Argentina by the Legislative Assistance Commission during the military governments.

49/ See report by Mrs. Nicole Questiaux, E/CN.4/Sub.2/1982/15, para. 163.

50/ See synoptic tables in the 1987 and 1988 reports.

51/ See notification of the Government of Sri Lanka in the synoptic table contained in E/CN.4/Sub.2/1987/19/Rev.1, p. 47).

52/ E/CN.4/Sub 2/1990/29, para. 41.

53/ See, for example, in chapter II, the cases dealt with by the Inter-Parliamentary Union of parliamentarians in common law countries who have been kept in detention for many years, even as long as 20 years, under a National Security Act. The Union has also dealt with cases of parliamentarians detained for decades in "re-education" camps in Viet Nam.

54/ See Amnesty International publication SC/PG/CO/GR, London, July 1988.

55/ The Hague International Tribunal established in Security Council resolution 827 (1993) of 25 May 1993.

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